85-121

No. .....

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In The
Supreme Court of the United States
October Term, 1984

—o—

RALPH KEMP, WARDEN,

Petitioner,

vs.

CHARLIE YOUNG, JR.,

Respondent.

—o—

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

—o—

PETITION FOR A WRIT OF CERTIORARI

—o—

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QUESTIONS PRESENTED

I.

Whether in light of Georgia case law interpreting Georgia's death penalty statute, the reasoning of this Court in *Bullington v. Missouri*, 451 U.S. 430 (1981), should not be extended so as to equate the factual findings made by a jury as to statutory aggravating circumstances with a jury's verdict as to guilt or innocence?

II.

Whether a federal court, acting in its capacity as a reviewing court in a federal habeas corpus action, may substitute its judgment for that of the highest state appellate court as to the construction to be given the statutory language contained in a state's death penalty statute?

III.

Whether, in light of Georgia law as to the imposition of the death penalty, double jeopardy principles do not prohibit the submission to the jury, on retrial as to sentence, of any statutory aggravating circumstances not originally submitted by the prosecution, nor found by the jury?

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI

—o—

The Petitioner, Ralph Kemp, respectfully prays that the writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals entered in this action on May 3, 1985.

—o—

OPINIONS BELOW

The decision of the United States Court of Appeals for the Eleventh Circuit is reported in *Young v. Kemp,* 760 F.2d 1097 (11th Cir. 1985). (Appendix A). The decision of the United States Court of Appeals for the Eleventh Circuit denying Petitioner's petition for rehearing and suggestion for rehearing *en banc* was entered on

June 7, 1985. (Appendix B). The opinion of the district court denying Respondent's motion to enforce judgment prior to Respondent's retrial is reported in *Young v. Zant*, 585 F.Supp. 295 (M.D.Ga. 1984). (Appendix C).

Prior decisions of various courts in this case which are relevant to this petition for a writ of certiorari include the decision of the Georgia Supreme Court entered following Respondent's interlocutory appeal to that court prior to his retrial. *Young v. State*, 251 Ga. 153, 303 S.E.2d 431 (1983). (Appendix D). The prior decision of the United States Court of Appeals for the Eleventh Circuit in this case which also bears on the issues raised by means of this petition for a writ of certiorari is contained in *Young v. Zant*, 667 F.2d 792 (11th Cir. 1982). (Appendix E).

JURISDICTIONAL STATEMENT

The opinion of the panel of the United States Court of Appeals for the Eleventh Circuit was entered on May 3, 1983. *Young v. Kemp*, 760 F.2d 1097 (11th Cir. 1985). (Appendix A). A petition for rehearing and suggestion for rehearing *en banc* were denied on June 7, 1985. (Appendix B).

This petition for a writ of certiorari has been timely filed within the allowable 90 days. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The United States Constitution, Fifth Amendment:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb . . . .

O.C.G.A. § 17-10-30(b)(2); (b)(4):

In all cases of other offenses for which the death penalty may be authorized, the judge shall consider, or he shall include in his instructions to the jury for it to consider, any mitigating circumstances or aggravating circumstances otherwise authorized by law and any of the following statutory aggravating circumstances which may be supported by the evidence:

> (2) The offense of murder, rape, armed robbery, or kidnapping was committed while the offender was engaged in the commission of another capital felony or aggravated battery, or the offense of murder was committed while the offender was engaged in the commission of burglary or arson in the first degree.
>
> (4) The offender committed the offense of murder for himself or another, for the purpose of receiving money or any other thing of monetary value;

O.C.G.A. § 16-8-41(a):

A person commits the offense of armed robbery when, with intent to commit theft, he takes the property of an-

other from the person or the immediate presence of another by use of an offensive weapon, or any replica, article, or device having the appearance of such weapon. The offense of robbery by intimidation shall be a lesser included offense in the offense of armed robbery.

———o———

STATEMENT OF THE CASE

Respondent, Charlie Young, Jr., was convicted in the Superior Court of Greene County, Georgia, for the offenses of murder, armed robbery and robbery by intimidation on February 19, 1976. Respondent Young received a sentence of death for murder, a life sentence for armed robbery and a twenty year sentence for the offense of robbery by intimidation. The imposition of the death sentence was authorized by a finding by the jury of two statutory aggravating circumstances:

(1) The offense of murder was committed while the offender was engaged in the commission of another capital felony, to wit: armed robbery. O.C.G.A. § 17-10-30(b)(2);

(2) The offender committed the offense of murder for the purpose of receiving money. O.C.G.A. § 17-10-30(b)(4).

On appeal to the Supreme Court of Georgia, Respondent's convictions and sentences were affirmed in *Young v. State,* 237 Ga. 852, 230 S.E.2d 287 (1976). An application for state habeas corpus relief was denied. The denial

of state habeas corpus relief was affirmed by the Supreme Court of Georgia in *Young v. Ricketts*, 242 Ga. 559, 250 S.E.2d 404 (1978), *cert. denied*, 442 U.S. 934 (1979).

Next, Respondent Young filed an application for federal habeas corpus relief. On December 5, 1980, the United States District Court for the Middle District of Georgia, Athens Division, entered an order granting the writ of habeas corpus only as it pertained to the imposition of the death penalty, based on the district court's finding that Respondent's trial attorney deprived him of his Sixth and Fourteenth Amendment rights to reasonably effective assistance of counsel during the sentencing phase of his trial. The district court also opined that Respondent had been sentenced to death as the result of an improper finding of statutory aggravating circumstances. *See Young v. Zant*, 506 F.Supp. 274, 280 (M.D.Ga. 1980).

Both counsel for Petitioner and Respondent appealed to the United States Court of Appeals for the Eleventh Circuit. On appeal to the Eleventh Circuit, counsel for the Petitioner specifically alleged that the district court improperly concluded that Respondent's sentence of death was not authorized by the two statutory aggravating circumstances found by the jury. Petitioner urged on appeal to the Eleventh Circuit that an examination of the trial transcript revealed that the statutory aggravating circumstances contained in O.C.G.A. § 17-10-30(b)(2) and (b)(4) were supported by the evidence produced at Respondent's trial.

Following oral argument, the Eleventh Circuit Court of Appeals concluded that Respondent had received ineffec-

tive assistance of counsel at both phases of Respondent's trial and, therefore, reversed the order of the district court with respect to the guilt phase and granted the writ of habeas corpus with respect to both phases of Respondent's trial. *Young v. Zant,* 667 F.2d 792 (11th Cir. 1982).

During the October Term of 1984, Respondent was re-indicted in the Superior Court of Greene County for the offenses of armed robbery, murder and robbery. Counsel for Respondent was notified of the State's intention to seek a death penalty, utilizing the original two statutory aggravating circumstances which were submitted and found by the jury during Respondent's first trial and based also upon an additional statutory aggravating circumstance as contained in O.C.G.A. § 17-10-30(b)(7). Respondent filed a plea of double jeopardy in the trial court and ultimately pursued an interlocutory appeal to the Supreme Court of Georgia.

The Supreme Court of Georgia upheld the ruling of the trial court denying Respondent's plea of double jeopardy, concluding that the effect of the Eleventh Circuit's reversal of the district court's opinion was to "nullify" the opinion of the district court. The Supreme Court of Georgia found no bar to the utilization at Respondent's retrial as to sentence of the original two statutory aggravating circumstances submitted by the court in Respondent's first sentencing trial and found by the jury during the first sentencing phase. *Young v. State,* 251 Ga. 153, 303 S.E.2d 431 (1983).

A petition for a writ of certiorari filed in this Court was denied on January 9, 1984.

Prior to Respondent's retrial as to sentence, Respondent filed a motion to enforce judgment in the United States District Court for the Middle District of Georgia, Athens Division. The district attorney was added as a Respondent to that action, District Attorney Joseph H. Briley of the Ocmulgee Judicial Circuit, as District Attorney Briley was acting as the prosecutor in the retrial as to sentence of the Respondent. Following briefing and oral argument in the district court, the court denied the motion to enforce judgment. *Young v. Zant*, 585 F.Supp. 295 (M.D. Ga. 1984).

A notice of appeal was filed on behalf of the Respondent in the United States Court of Appeals for the Eleventh Circuit. Following briefing and oral argument, the court rendered a decision on May 3, 1985, finding that the State may not seek to impose the death penalty in Respondent Young's retrial, utilizing either the two statutory aggravating circumstances originally submitted by the court and returned by the jury in Respondent's first trial, or the additional statutory aggravating circumstance sought to be utilized by the prosecution during Respondent's retrial as to sentence. On June 7, 1985, the United States Court of Appeals for the Eleventh Circuit denied Petitioner's petition for rehearing and suggestion for rehearing *en banc*.

Petitioner seeks review of the decision of the United States Court of Appeals for the Eleventh Circuit in *Young v. Kemp*, 760 F.2d 1097 (11th Cir. 1985).

———o———

REASONS FOR GRANTING THE WRIT

I. UNDER GEORGIA'S STATUTORY SCHEME FOR IMPOSING THE DEATH PENALTY, A JURY'S FINDINGS ON STATUTORY AGGRAVATING CIRCUMSTANCES MAY NOT BE DEEMED TO BE THE EQUIVALENT OF A JURY'S VERDICT AS TO THE GUILT OR INNOCENCE OF A DEFENDANT.

The decision of the Eleventh Circuit Court of Appeals in this case, as contained in *Young v. Kemp,* 760 F.2d 1097 (11th Cir. 1985) erroneously extends the holding of this Court in *Bullington v. Missouri,* 451 U.S. 430 (1981), so as to equate, for double jeopardy purposes, a finding by a Georgia jury as to the presence of statutory aggravating circumstances with a Georgia jury's verdict as to guilt or innocence. This is in direct conflict with the decisions of the Supreme Court of Georgia interpreting the nature and function of statutory aggravating circumstances and also misapplies the decision of this Court in *Bullington v. Missouri, supra,* itself, so as to have disastrous consequences on the application of the Georgia death penalty statute and other capital punishment statutes modeled after the statute enacted in Georgia. Extending *Bullington v. Missouri, supra,* in this manner, so as to equate Georgia's statutory aggravating circumstance with "offenses," is clearly not what was contemplated by the Georgia General Assembly, nor is this the manner in which Georgia's death penalty statute has been interpreted by the Georgia Supreme Court.

In *Zant v. Redd,* 249 Ga. 211, 290 S.E.2d 36 (1982), *cert. denied,* — U.S. —, 103 S.Ct. 3552 (1983), the Supreme Court of Georgia held that:

> Aggravating circumstances are procedural safeguards designed to control a jury's discretion in capital cases in order to ensure against capricious and arbitrary enforcement of the death penalty. (Citations Omitted). Aggravating circumstances are not substantive "penalties" or "offenses"; they do not place the defendant's life in peril or subject him to a possible "conviction"; they are standards which guide a jury's discretion on what does place the defendant's life in jeopardy at the sentencing trial — the death penalty.

Id.

Prior to the Eleventh Circuit's decision in *Young v. Kemp, supra,* the Eleventh Circuit had previously correctly declined to extend this Court's decision in *Bullington v. Missouri supra. See Green v. Zant,* 738 F.2d 1529, 1541 (11th Cir. 1984). Having cited the above-quoted passage from *Zant v. Redd, supra,* the Eleventh Circuit properly utilized the following analysis of the Georgia death penalty statute and declined to extend *Bullington:*

> We would further note that a jury need find only a single aggravating circumstance to impose the death sentence, O.C.G.A. § 17-10-31, and that the jury has the power to decline to impose the death penalty even if it finds that one or more statutory aggravating circumstances are present. *Id; Gregg v. Georgia,* 428 U.S. at 203, 96 S.Ct. at 2939. Thus, the legal significance that attaches to a jury's decision whether to state a given aggravating circumstance in support of its verdict is simply not comparable to that of the verdict itself. We therefore conclude that the analogy the Supreme Court drew between the verdict at a guilt/innocence trial and that at a sentencing hearing cannot be extended to cover a jury's findings on statutory aggravating circumstances.

Id. at 1541.

It should be noted that the Georgia's Supreme Court, in an interlocutory appeal filed prior to Respondent's retrial as to sentencing, found no reason to bar Respondent's retrial as to sentence. *See Young v. State*, 251 Ga. 153, 303 S.E.2d 431 (1983). The validity of the Supreme Court of Georgia's holding is correct under *Bullington v. Missouri* because of the differences in the Georgia death penalty statute and Missouri's statute. The differences in the two statutes were in fact noted by the United States Court of Appeals for the Eleventh Circuit in *Green v. Zant*, 738 F.2d 1529, 1540 (1984), in which decision the Eleventh Circuit stated:

> In *Bullington*, the Court held that "[B]ecause the sentencing proceeding at Petitioner's first trial was like the trial on the question of guilt or innocence, the protection afforded by the Double Jeopardy Clause to one *acquitted* by a jury also is available to him, with respect to the death penalty, at his retrial." 451 U.S. at 446, 101 S.Ct. at 1862 (Emphasis added). The court's decision in *Bullington* therefore turned on its conclusion that a Missouri jury's verdict at the sentencing phase of a capital trial is more properly analogous to a decision on guilt/innocence than it is to a non-capital criminal sentence, stressing such differences as the use of a reasonable doubt standard and other procedural devices that "*explicitly require* the jury to determine whether the prosecution has proved its case." *Id.* at 444, 101 S.Ct. at 1861 (Emphasis in original).

Id.

Not only is there a significant difference in the statutes involved in the instant case and in *Bullington* but there is a significant factual distinction. In *Bullington*, the "verdict" which was significant for double jeopardy purposes, was a life sentence, whereas in this case the original "verdict" as to sentence was death.

Due to the differences between Georgia's death penalty statute and Missouri's statute, as interpreted by the Georgia Supreme Court and for the reasons above stated, it is respectfully urged that this Court grant a petition for a writ of certiorari in order to determine in what manner *Bullington v. Missouri, supra,* is to be interpreted, as this is a question of exceptional importance to all death penalty cases in Georgia and the resolution of this question may have a potentially devastating effect on other capital sentencing statutes as well. To allow such an extension of *Bullington v. Missouri,* so as to equate aggravating circumstances with "offenses," would prohibit numerous retrials under an improper interpretation and application of the Georgia capital punishment scheme.

II. A REVIEWING COURT IN A HABEAS CORPUS ACTION MAY NOT SUBSTITUTE ITS JUDGMENT FOR THAT OF THE HIGHEST STATE COURT AS TO THE PROPER CONSTRUCTION TO BE GIVEN CERTAIN PORTIONS OF A PARTICULAR DEATH PENALTY STATUTE AND OTHER STATE STATUTES.

The United States Court of Appeals for the Eleventh Circuit in *Young v. Kemp, supra,* ignored the Supreme Court of Georgia's specific finding as to how a particular portion of Georgia's death penalty statute should be interpreted and substituted its opinion, as a reviewing court in a habeas corpus action, for the interpretation given to the statute by the Supreme Court of Georgia. Specifically, the Eleventh Circuit ignored the specific finding by the Supreme Court of Georgia that for a death penalty to be sufficiently supported under the statutory aggravating circumstance contained in O.C.G.A. § 17-10-30(b)(2), i.e., that

the murder was committed during the course of another capital felony to wit: armed robbery, it need not be shown that the taking of the property from the person "by use of an offensive weapon," as required under Georgia's law to establish armed robbery, occurred prior to the assault. *Young v. State, supra,* at 154. The offense of armed robbery is defined in O.C.G.A. § 16-8-41, formerly Ga. Code Ann. § 26-1902 as follows:

> A person commits the offense of armed robbery when, with intent to commit theft, he takes property of another from a person or the immediate presence of another by use of an offensive weapon or any replica, article, or device having the appearance of such weapon. The offense of robbery by intimidation shall be a lesser included offense in the offense of armed robbery.

In *Young v. State,* 251 Ga. 153, 303 S.E.2d 431 (1983), the Supreme Court of Georgia affirmed its earlier opinion in *Moore v. State,* 233 Ga. 861, 864, 213 S.E.2d 829 (1975), in which the court noted that under actual circumstances similar to those presented in this case, "Without the force used by appellant here, the taking from [the victim] could not have been accomplished. That [the victim] died from the force used either immediately, or subsequently to the taking, does not make the offense any less a robbery." *Young v. State, supra, citing Moore v. State, supra* at 157. The Supreme Court of Georgia concluded, "Under the law of Georgia, therefore, the fact that Young's victim was incapacitated at the time of the taking cannot extricate his conduct from the definition of armed robbery in § 16-8-41(a) (Code Ann. § 26-1902)." *Id.*

Instead of adopting the Supreme Court of Georgia's interpretation of the armed robbery statute and of the

aggravating circumstance contained in O.C.G.A. § 17-10-30(b)(2), concerning when a murder will have been committed in the course of an armed robbery, the Eleventh Circuit adopted the dissenting opinion in *Young v. State, supra.* Petitioner respectfully submits that by reinterpreting the elements of armed robbery under Georgia law and by reinterpreting that portion of Georgia's death penalty statute involving the imposition of the death penalty when a murder is committed during the "course of" an armed robbery, the Eleventh Circuit Court of Appeals is overstepping the proper scope of its review as a federal habeas corpus court and is, in effect, acting as the ultimate arbiter of Georgia law both in its interpretation and application.

The fact that the Eleventh Circuit Court of Appeals is reinterpreting Georgia's death penalty statute is further illustrated by that portion of the opinion of the Eleventh Circuit in this case which states that:

> The State argues that even if we find that imposition of the death penalty is barred with respect to the two aggravating factors alleged in Young's first trial, the State may still seek the death penalty on the basis of a "new" aggravating factor, O.C.G.A. § 17-10-30(b)(7) (involving whether the murder was "outrageously or wantonly vile, horrible, or inhuman in that it involved torture, depravity of mind, or an aggravating battery to the victim"). We disagree.

See Young v. Kemp, supra, fn.12.

No reasons are given in support of this portion of the Eleventh Circuit's opinion which Petitioner urges results in a complete reshaping of Georgia death penalty law. The effect of such a holding, based on whatever principles, will engender damaging results in this and many other cases in which a retrial of a person originally receiving a death

penalty might occur. As has already been argued, Petitioner respectfully submits that because "statutory aggravating circumstances" cannot be equated with "offenses" under Georgia law, double jeopardy principles cannot be invoked to prohibit Respondent's retrial and the seeking of another death penalty utilizing whatever statutory aggravating circumstances are deemed to be appropriate that might be submitted by the trial court under the facts of the case on retrial. As the Eleventh Circuit properly noted in *Green v. Zant, supra,* at 1541, *citing* this Court's decision in *Zant v. Stephens,* 462 U.S. 862 (1983):

> First, while it is true that a Georgia sentencing jury cannot recommend the death penalty unless it finds that at least one aggravating circumstance exists beyond a reasonable doubt. Off. Code Ga. Ann. § 17-10-30(c), the jury is not required to return a death sentence whenever aggravating circumstances are found to exist. The function of statutory aggravating circumstances in Georgia is in fact quite limited: they serve to winnow down the number of cases in which the death penalty can be imposed by requiring the jury to focus its consideration on the particular circumstances of the crime. Once the jury has found that a given case is one of the limited number in which the death penalty is a possible sanction, however, its discretion in selecting capital punishment is absolute. (Cites Omitted).

Therefore, under Georgia's statutory sentencing scheme, as interpreted by the Georgia courts, as recognized in some cases decided by the Eleventh Circuit, but not the instant case, it is for the jury to determine what statutory aggravating circumstances exist and whether or not to impose the death penalty. The State is free, under Georgia law, to urge upon the jury at Respondent's retrial any statutory aggravating circumstance, whether utilized

at the first trial or not, which is supported by the evidence presented during the retrial. Petitioner respectfully submits that this question is one of exceptional importance in every Georgia death penalty case and that the substitution of a federal habeas corpus court's interpretation of state law for that of the state's highest supreme court results in an exceptional question which requires that a petition for a writ of certiorari be granted.

CONCLUSION

For all of the above and foregoing reasons, Petitioner prays that this Court grant a writ of certiorari in order to review the judgment and opinions of the United States Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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APPENDIX "A"

Charlie YOUNG, Jr.,

Petitioner-Appellant,

v.

Ralph KEMP, Warden, Georgia Diagnostic & Classification Center, Joseph H. Briley, District Attorney of Ocmulgee Circuit, Respondents-Appellees.

No. 84-8408.

United States Court of Appeals,
Eleventh Circuit.

May 3, 1985.

Following his conviction of murder, armed robbery and robbery by intimidation, 230 S.E.2d 287, Georgia prisoner sought federal habeas relief. The United States District Court for the Middle District of Georgia, Wilbur D. Owens, Jr., Chief Judge, 506 F.Supp. 274, granted petition as to death penalty only, and petitioner and state appealed. Following reversal of denial of writ with respect to guilt phase of trial, 677 F.2d 792, the District Court, 585 F.Supp. 295, declined to enforce its prior habeas judgment by applying double jeopardy clause to bar imposition of death penalty in retrial and certified controlling question for immediate appeal. The Court of Appeals, R. Lanier Anderson, III, Circuit Judge, held that District Court finding that evidence was legally insufficient to support finding of aggravating circumstances under Georgia death penalty statute precluded state's attempt to impose death penalty on petitioner in his retrial.

Reversed and remanded.

Wade M. Crumbley, McDonough, Ga., for petitioner-appellant.

Susan V. Boleyn, Asst. Atty. Gen., Atlanta, Ga., for respondents-appellees.

Appeal from the United States District Court for the Middle District of Georgia.

Before KRAVITCH and ANDERSON, Circuit Judges, and ATKINS*, District Judge.

R. LANIER ANDERSON, III, Circuit Judge

Appellant Young's habeas corpus death penalty petition appears for a second time in this court. Young maintains that the district court's initial judgment, *Young v. Zant*, 506 F.Supp. 274 (M.D.Ga.1980)—holding that there was insufficient evidence to support the death sentence, *i.e.*, insufficient evidence to prove the alleged statutory aggravating factors beyond a reasonable doubt as required by the Georgia death penalty statute, Ga.Code Ann. § 17-10-30(c)—bars the state under the Double Jeopardy Clause from seeking the death penalty in its current retrial of Young.

I. PROCEDURAL HISTORY

Young was tried and convicted of murder, armed robbery, and robbery by intimidation in the Superior Court of Green County, Georgia, in February of 1976. The evidence presented at trial showed that after a heated argument with his banker, Flynt, over a loan, Young shot and killed the banker. After the shooting, Young took a wallet from his victim's back pants pocket and left the scene of

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* Honorable C. Clyde Atkins, U.S. District Judge for the Southern District of Florida, sitting by designation.

the crime.[1] Pursuant to Georgia's bifurcated death sentencing procedures, *see* Ga.Code Ann. § 17-10-30, *et seq.*, Young was sentenced to death after the jury found that Young was guilty beyond a reasonable doubt of two statutory aggravating factors.[2] The two aggravating factors found were:

> (1) "[T]he offense of murder . . . was committed while the offender was engaged in the commission of another capital felony," *i.e.*, armed robbery; and
>
> (2) "[T]he offender committed the offense of murder . . . for the purpose of receiving money"

Ga.Code Ann. § 17-10-30(b)(2), (4).

After exhausting all available state remedies, Young filed a habeas corpus petition in the United States District Court for the Middle District of Georgia pursuant to 28 U.S.C.A. § 2254. Young alleged several constitutional infirmities, only two of which are relevant to this appeal. First, he maintained that his trial counsel pro-

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1. A summary of the evidence adduced at trial is presented in this court's initial habeas opinion. *Young v. Zant*, 677 F.2d 792 (11th Cir.1982). It is not necessary to review all the facts; those facts necessary to the adjudication of the issues presented will be supplied in the course of this opinion.

2. Under Georgia's death penalty statute, with certain exceptions not relevant here, the jury can only impose the death sentence if it finds the defendant guilty of a capital crime and, then, in a separate proceeding, finds the defendant guilty beyond a reasonable doubt of at least one of the statutory aggravating factors. Ga. Code Ann. § 17-10-31. Even if the jury finds the defendant guilty of a statutory aggravating factor, it nevertheless has complete discretion to forego imposing the death sentence, and to sentence the defendant to life in prison. *Id.; Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976).

vided ineffective assistance of counsel at both the guilt/innocence phase of his trial and at the sentencing phase. Second, Young maintained that the evidence adduced at trial was insufficient to support either aggravating circumstance beyond a reasonable doubt. Thus, Young argued, his death sentence could not stand because Georgia law requires such a sentence to be supported by at least one legitimate aggravating factor. Ga.Code Ann. § 17-10-31. The district court ruled that Young's trial counsel had been reasonably effective at the guilt/innocence phase of the trial. However, the court held that Young's counsel had been constitutionally ineffective at the sentencing phase of the trial. In addition, the district court agreed with Young that the evidence was insufficient to support either of the statutory aggravating factors. *See Young v. Zant,* 506 F.Supp. at 278-81. The court found that there was no evidence that Young had formed the intent to rob his victim prior to the killing and, thus, the murder was not perpetrated while Young was *engaged* in another capital felony (*i.e.,* armed robbery), nor for the *purpose* of receiving money. Thus, the district court granted the writ of habeas corpus with respect to Young's death sentence.

The state appealed the district court's ruling with respect to Young's death sentence, and Young cross-appealed from the denial of his other claims. On appeal, this court made only one explicit ruling: that Young's counsel provided ineffective assistance during the guilt/innocence phase of the trial, as well as during the sentencing phase. *Young v. Zant,* 677 F.2d 792 (11th Cir.1982). Thus, the court held that "[t]he district court's denial of the writ of habeas corpus with respect to the guilt phase

of Charlie Young's trial is . . . REVERSED." *Id.* at 800. With respect to the district court's holding that there was insufficient evidence to support the statutory aggravating factors, this court made no explicit determination.[3] However, the court acknowledged the district court's ruling in this regard, *id.* at 794, 799, and discussed the "deficiency in the evidence" in the course of highlighting Young's ineffectiveness claim. *Id.* at 799.

After this court's decision in *Young v. Zant, supra,* Young was reindicted by the Green County grand jury. The grand jury again charged Young with murder, armed robbery, and robbery by intimidation. Subsequently, on December 8, 1982, Young's trial counsel was served with a new "notice of statutory aggravating circumstances," indicating that the state would again seek the death penalty. The notice stated that the two aggravating circumstances alleged in Young's first trial would again serve as bases for the imposition of the death penalty. In addition, the notice indicated that the state would seek to submit to the jury a third aggravating circumstance: that the murder was "outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim." *See* Ga.Code Ann. § 17-10-30(b)(7).

Upon receiving this new notice of statutory aggravating circumstances, Young pleaded double jeopardy, arguing that the federal district court's insufficiency finding

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3. The court of appeals' failure to explicitly rule on the insufficiency claim in *Young v. Zant,* 677 F.2d 792 (11th Cir. 1982), is of critical importance in assessing Young's double jeopardy claim in the instant appeal. *See infra* Part II.A.

amounted to former jeopardy under *Burks v. United States,* 437 U.S. 1, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978), and *Bullington v. Missouri,* 451 U.S. 430, 101 S.Ct. 1852, 68 L.Ed.2d 270 (1981). This plea was overruled by the trial court and appealed to the Georgia Supreme Court. The Georgia Supreme Court agreed with the trial court, finding no double jeopardy bar to the imposition of a new death sentence based on the same aggravating factors alleged in the first trial. *Young v. State,*[4] 251 Ga. 153, 303 S.E.2d 431 (1983) (one Justice dissented), *cert. denied sub nom, Young v. Georgia,* — U.S. —, 104 S.Ct. 740, 79 L.Ed.2d 198 (1984) (two Justices dissented from denial of certiorari). Subsequently, the case was returned to the Green County Superior Court for trial. On March 14, 1984, Young filed in federal district court a "Motion to Enforce Judgment" in his original federal habeas corpus proceeding. Young argued that the state's attempt to impose the death penalty violated the Double Jeopardy Clause in light of the district court's prior determination of evidentiary insufficiency with regard to the statutory aggravating factors alleged in Young's first trial. The district court declined to enforce its prior habeas judgment by applying the Double Jeopardy Clause to bar imposition of the death penalty in Young's retrial, suggesting instead that it was appropriate for this court to determine the validity of the double jeopardy claim, because the decision would turn in part on the meaning of the previous decision of this court. *Young v. Zant,* 585 F.Supp. 295 (M.D.Ga.1984) (*"Young II"*).

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4. A fuller discussion of the Georgia Supreme Court decision and its implications with regard to Young's double jeopardy claim appears in Part II.B, *infra.*

[1] We conclude that the previous judgment of this court left intact the district court's finding of insufficient evidence to support the death sentence. That being the case, the double jeopardy principles announced in *Burks v. United States*, 437 U.S. 1, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978), and *Bullington v. Missouri*, 451 U.S. 430, 101 S.Ct. 1852, 68 L.Ed.2d 270 (1981), prevent the state from seeking the death penalty in Young's retrial. We therefore reverse.

II. DISCUSSION

In reviewing Young's double jeopardy claim, we must answer two principal questions: (1) what was the effect of this court's decision in *Young v. Zant*, 677 F.2d 792, on the validity of the district court's finding that there was insufficient evidence to buttress the aggravating factors alleged to support Young's death sentence? *See Young v. Zant*, 506 F.Supp. 274, 280-81; and (2) what are the double jeopardy implications of the district court's holding?

A. *This Court's Initial Decision*

[2, 3] As indicated above, this court made no explicit ruling with regard to the district court's holding that there was insufficient evidence to support the aggravating factors alleged by the state. It is important to ask whether this court implicitly affirmed or reversed the district court's sufficiency finding.[5]

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5. In the first instance, it is important to ask whether a finding of constitutional insufficiency is reviewable at all, *i.e.*, whether double jeopardy attaches as soon as a court makes

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It is clear that the court of appeals was cognizant of the district court's finding regarding sufficiency and that the state sought reversal of this finding. 677 F.2d at 794. Although the court did not entertain the sufficiency issue for adjudication per se, it did comment on the issue with respect to Young's ineffective assistance of counsel claim:

> Turning to the armed robbery count, we note the district court, in assessing the sufficiency of the

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its determination of insufficiency. This court has assumed otherwise—that it *can* reverse a federal district court's habeas determination of insufficient evidence—and it has done so when it found the lower court to be in error. *Martin v. Alabama*, 730 F.2d 721, 723 (11th Cir.1984). At first blush, this might seem to be at odds with the general proposition that a judgment of acquittal amounts to former jeopardy. However, where a reviewing court is assessing the sufficiency of the evidence in a case in which the defendant was originally convicted in the trial court (e.g., all federal habeas proceedings), a reversal of the reviewing court's insufficiency finding would not result in a *retrial* of the defendant. While a jury verdict of acquittal is absolutely final, see *Burks v. United States*, 437 U.S. 1, 16, 98 S.Ct. 2141, 2150, 57 L.Ed.2d 1 (1978), a judgment of acquittal after a jury conviction or an appellate reversal on the basis of insufficient evidence does not always amount to former jeopardy. There is a narrow exception in cases where an original jury verdict of guilty is set aside and a judgment of acquittal is entered on sufficiency of the evidence grounds either by the trial judge or by an intermediate appellate court. In such a case, it has been held that double jeopardy does not preclude a subsequent reversal on appeal of such a judgment of acquittal, because the appellate reversal would not result in a retrial, but rather in a reinstatement of the jury's guilty finding. *See United States v. Wilson*, 420 U.S. 332, 345, 95 S.Ct. 1013, 1022, 43 L.Ed.2d 232 (1975) ("a defendant has no legitimate claim to benefit from an error of law when that error could be corrected without subjecting him to a second trial before a second trier of fact"); *accord, Arizona v. Rumsey*, — U.S. —, —, 104 S.Ct. 2305, 2311, 81 L.Ed.2d 164, 172 (1984).

> State's evidence of aggravating circumstances on the malice murder charge, concluded that the State did not produce sufficient evidence to permit the jury to find beyond a reasonable doubt that Young had formed the intent to rob Flynt prior to the fatal assault. *Young v. Zant,* 506 F.Supp. at 280-81. This deficiency in the evidence should have been sufficiently clear to Garland [Young's trial attorney] to suggest a strong argument that Young did not rob Flynt by use of an offensive weapon and thus could not be guilty of armed robbery under Ga.Code Ann. § 26-1902.

677 F.2d at 799 [footnote ommitted]; *see also id.* at 794 n. 3. Young urges this court to consider the above quoted language as an implicit affirmance of the district court's sufficiency finding. While we acknowledge that the appellate court's description of the "deficiency in the evidence" amounts to a favorable comment upon the district court's sufficiency finding, we do not believe that the above quoted paragraph was intended as an affirmance. Nowhere in the opinion does the court take up the sufficiency issue as a separate matter. There is no question that the sufficiency issue was dealt with for the explicit purpose of highlighting the court's ineffective assistance of counsel analysis. *Cf. Young v. Zant,* 677 F.2d at 799 n. 12 ("Although the petitioner did not raise a claim regarding the sufficiency of the evidence to support his armed robbery conviction, we consider the insufficiency of that evidence in assessing the adequacy of Garland's assistance to Young under the Sixth Amendment"). Finally, the court ended its opinion by indicating that the relief being granted related only to the guilt/innocence phase of Young's trial. 677 F.2d at 800.

The state argues, on the other hand, that the effect of this court's opinion was to reverse the district court's sufficiency finding. This argument also has no merit. First, as Young's counsel pointed out at oral argument, if we read the court of appeals opinion as reversing the district court entirely, we would, as a matter of logic, be compelled to believe that this court meant to reverse the district court's ruling with respect to the numerous constitutional claims on which the district court denied relief. Such an interpretation of the court of appeals' opinion would be absurd since at least two of Young's claims were broad-based attacks on the constitutionality of the Georgia death penalty statute. Second, that this court intended to reverse the district court's sufficiency finding after discussing it favorably in conjunction with its ineffective assistance of counsel analysis is contrary to a common sense reading of the opinion. Finally, it is important to note the precise way in which the court of appeals granted relief. The court said:

> The district court's denial of the writ of habeas corpus *with respect to the guilt phase* of Charlie Young's trial is therefore REVERSED. On receipt of the mandate, the district court shall grant the writ.

677 F.2d at 800 (emphasis added). The emphasized language makes clear that the reversal did not relate to the sentencing phase of Young's trial, the phase which is pertinent to the sufficiency claim.

The state also argues that the court of appeals chose to "nullify" the district court's opinion, relying on the interpretation given our prior opinion by the Georgia Supreme Court. *See Young v. State,* 251 Ga. 153, 303 S.E.2d 431, 432-33 (1983). In denying Young's double

jeopardy claim, the Georgia Supreme Court put great stock in the fact that this court did not by its words explicitly affirm the district court. The Georgia court stated:

> Rather than reversing in part and affirming in part, the court of appeals chose to substitute its opinion for that of the district court.
>
> We perceive that the effect of this reversal was to nullify the entire opinion of the district court and to place the parties in the position *quo ante*, subject, of course, to the holdings of the court of appeals . . . . It follows that in reviewing the denial of Young's double jeopardy pleas, we look only to the opinion of the court of appeals.

Young v. State, 303 S.E.2d at 432.

We respectfully conclude that the idea that this court sought to "nullify" the district court opinion in all respects draws no support from the plain language of this court's opinion. Our conclusion is bolstered by the same reasons given above, indicating that this court could not have intended to reverse every aspect of the district court's judgment. If this court had chosen to substitute its opinion for the district court's, the more appropriate action would have been to "vacate," not "reverse." For the reasons indicated, we are confident that this court's prior opinion did not intend to "nullify" the district court's sufficiency finding.

Given the above analysis, it is apparent that the court of appeals did not appreciate the double jeopardy implications of the district court's sufficiency ruling[6] and,

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6. None of the participants in this case seem to have recognized the double jeopardy issue at this point in the liti-

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thus, did not find it necessary to reach the issue. The court apparently labored under the misunderstanding that by reversing the district court on a guilt/innocence phase issue, all sentencing phase issues were subsumed thereby, and were thus irrelevant. That being the case, we are left with an *undisturbed district court holding* with respect to its sentencing phase sufficiency finding.[7] The effect of leaving this portion of the district court holding undisturbed on appeal is the same as if there had been no appeal at all. *See* 1B J. Moore, *Moore's Federal Practice* ¶ 0.404 [9]. This holding became the law of the case.

We now must consider whether the state is barred under the Double Jeopardy Clause from seeking a death sentence in Young's retrial.

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gation. In fact, the district court had earlier suggested that the state might again seek the death penalty on retrial, although on different aggravating circumstances. *Young v. Zant*, 506 F.Supp. 274, 281 (M.D.Ga.1980). However, the district court cannot be faulted for this since its opinion was rendered prior to *Bullington v. Missouri*, 451 U.S. 430, 101 S.Ct. 1852, 68 L.Ed.2d 270 (1981), the case which first applied double jeopardy principles to the sentencing phase of a bifurcated death penalty system. *See infra* Part II.B.

7. We realize that a definitive ruling by the court of appeals on the sufficiency question would have produced a more satisfactory result. Nevertheless, the state was not left without procedural mechanisms to force a resolution of the issue. The state could have petitioned for rehearing or rehearing en banc to this court or for a writ of certiorari to the United States Supreme Court. The fact that the state did not use these procedural mechanisms indicates that it, too, did not appreciate the double jeopardy consequences of the district court's ruling at the time it was rendered.

B. *Does Double Jeopardy Attach to the District Court's Sufficiency Finding?*

Before turning to a consideration of the double jeopardy effect of the district court's insufficiency finding, we address two subsidiary arguments made by the state which contend that the district court's ruling was not, in reality, a holding that the evidence was legally insufficient.

First, the state argues, relying on the Georgia Supreme Court opinion, that the district court's finding was not actually one of insufficient evidence because the court misconstrued the applicable Georgia law. The Georgia Supreme Court apparently interpreted the district court opinion as holding that the fact of the victim's death prior to the taking, would extricate the defendant's conduct from the definition of armed robbery. *Young v. State*, 303 S.E.2d at 433-34. The Georgia court then properly criticized such a holding as being inconsistent with *Moore v. State*, 233 Ga. 861, 213 S.E.2d 829, 832 (1975). *Moore* held that a defendant may be convicted of armed robbery even if he incapacitates or kills the victim prior to the actual robbery, where the "[a]pellants' admitted purpose in going to [the victim's] home was to rob him." 213 S.E.2d at 832.

[4, 5] We respectfully conclude that the Georgia Supreme Court misinterpreted the district court opinion, and that the district court opinion is not in fact in derogation of *Moore v. State*. The district court did not hold that there can be no armed robbery merely because the victim dies prior to the taking (a holding which would be in derogation of *Moore v. State*); rather, the district court held that the murder must be "in the course of" the armed

robbery, and that the murder here was not "in the course of" the armed robbery because the intent to rob was an afterthought and was not formulated until after the murder was entirely completed (a holding which is not inconsistent with *Moore v. State*). The plain words of the district court opinion require this conclusion:

> The only relevant evidence presented at trial indicated that petitioner *did not contemplate* the taking of any money until after the shots had been fired and the blows had been struck, *i.e.*, after the murder had been committed. . . . Based on the evidence presented at trial, that petitioner prior to the commission of the murder had any *intent* to rob the victim is only speculation. . . .

Young v. Zant, 506 F.Supp. 274, 280-81 (emphasis added). Thus, the district court finding turns *not* on the notion that armed robbery cannot legally occur subsequent to the incapacitation or death of the victim, rather, the decision turns on the district court's conclusion that there was no evidence that the murder was committed *in the course* of the armed robbery or *for the purpose* of obtaining money, because the intent to rob and the purpose to obtain money were afterthoughts and, thus, non-existent until after the murder was entirely completed. The dissenting opinion in the Georgia Supreme Court puts it precisely:

> The district court found that the jury could only speculate that Young intended to rob the victim before committing the murder, . . . and thus that the evidence as to the first aggravating circumstance—murder committed *in the course* of an armed robbery—was insufficient.

Young v. State, 303 S.E.2d at 436 (dissenting opinion). We conclude that there was no erroneous construction of the Georgia statute.[8]

[6-8] Second, the state argues, relying again on the opinion of the Georgia Supreme Court, that the federal district court did not make a finding of constitutional insufficiency. The Georgia Supreme Court concluded that "[a]bsent a reliance upon *Jackson v. Virginia* . . . in support of [the federal district court's] determination, we conclude that the court's observations related to the *weight* of the evidence rather than the constitutional sufficiency." *Young v. State*, 303 S.E.2d at 434. The Georgia court's statement in this regard finds no support in the federal district court's habeas ruling. The district court stated, in relevant part:

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8. In any event, it is far from clear that an error of law, even if it did exist, would work in the state's favor. Generally, the fact that an acquittal may result from an erroneous evidentiary ruling or an error of law does not alter its double jeopardy implications. "[T]here is no exception permitting retrial once the defendant has been acquitted, no matter how 'egregiously erroneous' . . . the legal rulings leading to that judgment might be." *Sanabria v. United States*, 437 U.S. 54, 75, 98 S.Ct. 2170, 2184, 57 L.Ed.2d 43 (1978), *quoting Fong Foo v. United States*, 369 U.S. 141, 143, 82 S.Ct. 671, 672, 7 L.Ed.2d 629 (1962); *see also Arizona v. Rumsey*, — U.S. —, — - —, 104 S.Ct. 2305, 2310-11, 81 L.Ed.2d 164, 171-72 (1984) (applying this principle in death sentencing context). While it is true that any such error of law could have been corrected on appeal from the district court's judgment because it would not have resulted in the retrial of the defendant, *see supra* note 5, it would be another question entirely whether the district court's insufficiency judgment, which is now the law of the case, can be collaterally attacked where double jeopardy concerns are implicated. Because we find no error of law, we need not address that thorny issue. In any event, the state has made no such collateral attack argument seeking to avoid the law of the case doctrine.

> Petitioner also asserts as a basis for habeas corpus relief that the evidence at trial did not support the jury's finding of statutory aggravating circumstances . . . (b)(2), that the murder was committed during the course of an armed robbery, and . . . (b)(4) that the murder was commitied for the purpose of obtaining money. Having carefully considered all of the evidence presented at trial, the court finds that the evidence was not legally sufficient to support the jury's finding beyond a reasonable doubt that the murder was committed *in the course of* an armed robbery or *for the purpose of* obtaining money. The only relevant evidence presented at trial indicated that petitioner did not contemplate the taking of any money until after the shots had been fired and the blows had been struck, *i.e.*, after the murder had been committed. . . . Based on the evidence presented at trial, that petitioner prior to the commission of the murder had any intent to rob the victim is only speculation. Certainly the evidence does not prove these aggravating factors beyond a reasonable doubt.

Young v. Zant, 506 F.Supp. 274, 280-81 (emphasis in original). The above quoted language clearly constitutes a *Jackson v. Virginia* insufficiency finding, invoking the "reasonable doubt" standard announced in *Jackson* and referring to legal sufficiency. In *Jackson v. Virginia*, 443 U.S. 307, 324, 99 S.Ct. 2781, 2792, 61 L.Ed.2d 560 (1979), the Supreme Court held that a federal habeas court may grant the writ if upon the evidence presented in a state criminal proceeding "no rational trier of fact could have found proof of guilt beyond a reasonable doubt." The Georgia Supreme Court's reliance on the fact that the district court did not cite *Jackson v. Virginia* is not persuasive. A federal habeas court has no power to grant habeas corpus relief because it finds that the state convic-

tion is against the "weight" of the evidence, and there is no hint in the district court's opinion that the district court misunderstood this fundamental principle. We conclude that the district court's judgment cannot reasonably be construed to be anything other than a *Jackson v. Virginia* holding on the sufficiency of the evidence.

Having concluded that the district court's holding was, in reality, based on the legal insufficiency of the evidence, we now turn to the question of whether the state is barred under the Double Jeopardy Clause from seeking a death sentence in Young's retrial. In assessing Young's double jeopardy claim, we must consider two recent decisions of the United States Supreme Court.

[9] In *Burks v. United States*, 437 U.S. 1, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978), defendant Burks was tried in a federal district court. Before the case was submitted to the jury, Burks moved for a judgment of acquittal which was denied by the trial judge. The jury then found Burks guilty as charged. On appeal, the court of appeals held that the evidence was insufficient to support the verdict, but remanded to the district court to decide whether it was proper to retry Burks (*i.e.*, whether the government could produce additional evidence which would cure the insufficiency). The Supreme Court was thus "presented with the question of whether a defendant may be tried a second time when a reviewing court has determined that in a prior trial the evidence was insufficient to sustain the verdict of the jury." *Id.* at 5, 98 S.Ct. at 2144. Reasoning from the established doctrine that double jeopardy attaches to a judgment of acquittal, the court stated that to distinguish between a judgment of acquittal and appel-

late reversal based on insufficient evidence "would create a purely arbitrary distinction between those in petitioner's position and others who would enjoy the benefit of a correct decision by the [trial c]ourt." *Id.* at 11, 98 S.Ct. at 2147. The Court thus held "that the Double Jeopardy Clause precludes a second trial once the reviewing court[9] has found evidence legally insufficient. . . ." *Id.* at 18, 98 S.Ct. at 2151.

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9. An insufficiency finding by a habeas court under *Jackson v. Virginia*, like findings of legal insufficiency by other reviewing courts, must be given jeopardy effect. *See Tibbs v. Florida*, 457 U.S. 31, 44-45 & n. 21, 102 S.Ct. 2211, 2219-2220 & n. 21, 72 L.Ed.2d 652 (1982). In *Tibbs*, petitioner argued that the distinction between reversal on the basis of the weight of the evidence, with no double jeopardy consequences, and reversal on the basis of legally insufficient evidence, which would invoke the double jeopardy bar, would undermine *Burks* by encouraging appellate judges to mask insufficiency reversals as weight-of-the-evidence reversals. The Supreme Court responded that *Jackson v. Virginia* would place some restraints on that temptation. *Jackson v. Virginia* recognized that a federal habeas corpus court could enforce the Due Process prohibition against any conviction based on legally insufficient evidence. The clear implication of the Supreme Court's remarks in *Tibbs* is that a federal habeas corpus court's finding of insufficiency would carry double jeopardy consequences. If such were not the case, the difference between a *Jackson v. Virginia* insufficiency finding and a weight-of-the-evidence finding would be meaningless because in either case the defendant could be retried. The Fifth Circuit explained and applied this interpretation of *Tibbs* in *Carter v. Estelle*, 691 F.2d 777, 778-84 (5th Cir.1982), *cert. denied*, 460 U.S. 1056, 103 S.Ct. 1508, 75 L.Ed.2d 937 (1983). In addition, the First Circuit has explicitly held that a *Jackson v. Virginia* insufficiency finding creates a double jeopardy bar under *Burks*. *Lydon v. Justices of Boston Municipal Court*, 698 F.2d 1, 2-3, 7 (1982), *rev'd on other grounds*, — U.S. —, 104 S.Ct. 1805, 80 L.Ed.2d 311 (1984); *cf. Greene v. Massey*, 706 F.2d 548 5th Cir.1983), *cert. denied*, — U.S. —, 104 S.Ct. 718, 79 L.Ed.2d 180 (1984).

In *Bullington v. Missouri*, 451 U.S. 430, 101 S.Ct. 1852, 68 L.Ed.2d 270 (1981), the Supreme Court held that double jeopardy principles apply to the sentencing phase of Missouri's bifurcated death penalty system.[10] Bullington was convicted in state court of a capital offense for which the state sought the death penalty. However, the jury in its discretion sentenced him to life in prison without eligibility for probation or parole for 50 years. Thereafter, Bullington was granted a new trial on the ground that his trial jury was not drawn from a fair cross-section of the community. *See Duren v. Missouri*, 439 U.S. 357, 99 S.Ct. 664, 58 L.Ed.2d 579 (1979). The state then sought to retry Bullington, and served him with a "Notice of Evidence of Aggravation," indicating that the state would again seek the death penalty on the basis of the same aggravating circumstances as were alleged in his first trial.

While acknowledging the Court's historical resistance to extending double jeopardy principles to sentencing, *see*

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10. The Missouri structure is similar to Georgia's in that the same jury makes both the guilt/innocence and sentencing phase determinations, that the jury must find at least one aggravating factor beyond a reasonable doubt, and that the jury may always sentence the defendant to life, even if it finds that the aggravating factors "outweigh" the mitigating factors. *Bullington v. Missouri*, 451 U.S. 430, 432-35, 101 S.Ct. 1852, 1854-56, 68 L.Ed.2d 270 (1981). The Missouri statute has certain provisions not found in the Georgia statute, e.g., a specific enumeration of mitigating factors; however, the state does not argue, nor could it, that any statutory differences between the Georgia and Missouri schemes make *Bullington* inapplicable here. *Cf. Arizona v. Rumsey*, — U.S. —, 104 S.Ct. 2305, 81 L.Ed.2d 164 (1984) (*Bullington* fully applicable where judge, not jury, makes sentencing determination).

e.g., United States v. DiFrancesco, 449 U.S. 117, 101 S.Ct. 426, 66 L.Ed.2d 328 (1980); *North Carolina v. Pearce,* 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969), the Court noted that Missouri's death penalty procedures

> differ[ ] significantly from those employed in any of the . . . cases where the Double Jeopardy Clause has been held inapplicable to sentencing . . . . The presentence hearing resembled and, indeed, in all relevant respects was like the immediately preceding trial on the issue of guilt or innocence. It was itself a trial on the issue of punishment so precisely defined by the Missouri statutes.

Bullington, 451 U.S. at 438, 101 S.Ct. at 1858; *accord, Arizona v. Rumsey,* — U.S. —, 104 S.Ct. 2305, 81 L.Ed.2d 164 (1984).

[10] Young's situation is different from the precise situation presented in *Bullington,* because the insufficiency finding here was originally rendered by a reviewing court, not by the sentencing jury as was the case in *Bullington.* However, we need only look to *Burks* to understand that the finding of the federal district court in Young's case that the evidence was insufficient to support the death sentence also invokes double jeopardy principles. To deny Young access to the constitutional right established in *Bullington* "would create a purely arbitrary distinction between those in [Young's] position and others who [like Bullington] enjoyed the benefit of a correct decision by the [trial c]ourt." *Burks v. United States,* 437 U.S. at 11, 98 S.Ct. at 2147. The principle of *Burks* leads us inexorably to the conclusion that *Bullington* is fully ap-

plicable to the facts of this case.[11] *Accord, Jones v. Thigpen*, 741 F.2d 805, 815 (5th Cir.1984) ("*Burks* interacts with *Bullington:* if the jury under *Bullington* or an appellate court under *Burks* finds the prosecution's evidence in support of the death penalty insufficient, the defendant cannot again be made to face a possible death

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11. *Green v. Zant*, 738 F.2d 1529 (11th Cir.1984), and *Zant v. Redd*, 249 Ga. 211, 290 S.E.2d 36 (1982), relied upon by the state, are inapposite. *Redd* involved an original sentencing trial in which the state relied upon three aggravating circumstances. The jury's findings listed only one of the aggravating factors in recommending the death sentence. After reversal on appeal for trial error, the state, at resentencing, relied upon the same three aggravating circumstances plus an additional one. The second jury's findings in recommending death listed two aggravating circumstances, including one presented but not found at the original sentencing. The Georgia Supreme Court rejected Redd's double jeopardy argument. It held that the original jury's failure to list the aggravating circumstance could not be considered an acquittal because the jury was instructed that it need only find one of the several aggravating circumstances presented. Thus, having found one aggravating circumstance, the original jury might well have simply declined to decide whether the other ones were proved. The Georgia court also declined to equate the failure to find one of several aggravating circumstances with the verdict itself, which was accorded double jeopardy effect in *Bullington*.

    Although *Green* involved facts even more remote from the instant case than Redd, this court approved the rationale of *Redd*.

    The instant case does not involve the mere failure of one of several aggravating circumstances. Here, there was legally insufficient evidence with respect to the only aggravating circumstances presented to the jury. Thus, the death sentence itself fell for lack of legally sufficient evidence. This situation *is* comparable to the verdict itself, which was accorded double jeopardy significance in *Bullington*. *See Green v. Zant*, 738 F.2d at 1541.

sentence"). Thus, we hold that the state may not attempt to impose the death penalty on Young in his retrial.[12]

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12. The state argues that even if we find that imposition of the death penalty is barred with respect to the two aggravating factors alleged in Young's first trial, the state may still seek the death penalty on the basis of a "new" aggravating factor, Ga.Code Ann. § 17-10-30(b) (7) (involving whether the murder was "outrageously or wantonly vile, horrible, or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim"). We disagree.

Bullington is based on the notion that, after the equivalent of a judgment of acquittal, a defendant must not be forced to run the gauntlet and stand trial for his life again. Although *Bullington* involved an attempt at retrial based upon the same aggravating factors used in the original trial, its holding is explicitly not limited to such a circumstance. The court said that

> our decision today does not at all depend upon the State's announced intention to rely only upon the same aggravating circumstances it sought to prove at petitioner's first trial or upon its statement that it would introduce no new evidence in support of its contention that petitioner deserves the death penalty. Having received "one fair opportunity to offer whatever it could assemble," *Burks v. United States* . . ., the state is not entitled to another.

451 U.S. at 446, 101 S.Ct. at 1862. The above quotation from *Bullington* also disposes of the ground upon which the district court apparently relied in its most recent opinion, declining to find double jeopardy effect. The district court apparently interpreted in its original insufficiency holding as meaning "not that there was insufficient evidence to support the death sentence but rather that the evidence was not sufficient to support the death penalty based on the particular aggravating circumstances relied upon by the district attorney." *Young II*, 585 F.Supp. at 299. As the above-quoted language from *Bullington* makes clear, having elected to rely on the two aggravating circumstances at Young's original sentencing trial, and having failed to adduce legally sufficient evidence to support a death sentence on those aggravating circumstances, the state is not entitled to a second attempt.

Accordingly, the district court's judgment is REVERSED, and the case is REMANDED to the district court for the issuance of an order that the state may not seek to impose the death penalty in Young's retrial.

APPENDIX "B"

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 84-8408

CHARLIE YOUNG, JR.,

Petitioner-Appellant,

versus

RALPH KEMP, Warden, Georgia Diagnostic & Classification Center, JOSEPH H. BRILEY, District Attorney for Ocmulgee Circuit,

Respondent-Appellees.

Appeal from the United States District Court
For the Middle District of Georgia

ON PETITION FOR REHEARING AND
SUGGESTION FOR REHEARING EN BANC

(Opinion May 3, 1985, 11 Cir., 198—, — F.2d —).
(Filed June 7, 1985)

Before KRAVITCH and ANDERSON, Circuit Judges, and ATKINS*, District Judge.

PER CURIAM:

(✓) The Petition of Rehearing is DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of

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* Hon. C. Clyde Atkins, U.S. District Judge for the Southern District of Florida.

Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ R. Lanier Anderson
United States Circuit Judge

APPENDIX "C"

CHARLIE YOUNG, JR.,

Petitioner,

v.

WALTER ZANT, et al.,

Respondents.

Civ. A No. 79-100-ATH.
United States District Court,
M.D. Georgia,
Athens Division.
April 20, 1984.

The United States District Court for the Middle District of Georgia, 506 F.Supp. 274, ordered habeas petitioner to be resentenced, and the Court of Appeals, 677 F.2d 792, affirmed. Petitioner requested that the district attorney be required to abide by District Court's prior judgment in again seeking death penalty against him at retrial. The District Court, Owens, Chief Judge, held that: (1) it could not be said with certainty that a double jeopardy violation would result if district attorney was again allowed to seek death penalty, but (2) if Court of Appeals considered District Court's previous discussion as to sufficiency of evidence to support aggravating circumstances as binding and affirmed District Court in that regard, a more detailed consideration would have to be made of petitioner's double jeopardy claim and effect of District Court's prior judgment.

Motion to enforce judgment denied; controlling question certified for immediate appeal.

Wade M. Crumbley, McDonough, Ga., for petitioner
Susan V. Boleyn, Atlanta, Ga., for respondents.

ORDER

OWENS, Chief Judge.

Currently before the court is petitioner Charlie Young's motion made pursuant to Rule 70 of the Federal Rules of Civil Procedure to enforce the judgment in this case entered by this court on December 5, 1980, in which this court ruled that petitioner was denied effective assistance of counsel at the sentencing phase of his trial. This court also noted that petitioner's death sentence was invalid because the evidence was not sufficient to support the jury's finding of aggravating circumstances beyond a reasonable doubt.[1] As a result, petitioner was ordered to be resentenced, failing which a writ of habeas corpus would be granted. *Young v. Zant*, 506 F.Supp. 274 (M.D. Ga. 1980).[2]

The parties then filed cross-appeals from this court's decision, and the United States Court of Appeals for the Eleventh Circuit ruled that petitioner had also been denied effective assistance of counsel at the guilt-innocence phase of his bifurcated trial. This court's ruling as

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1. The aggravating circumstances which the State relied on previously were that the murder for which petitioner was convicted was committed during the course of an armed robbery, O.C.G.A. § 17-10-30(b) (2), and for the purpose of obtaining money, O.C.G.A. § 17-10-30(b) (4).

2. A detailed history of petitioner's appeals may be found in the State's response to petitioner's Motion to Enforce Judgment and will not be repeated here.

to the sentencing phase remains undisturbed. *Young v. Zant*, 677 F.2d 792 (11th Cir.1982).

On September 29, 1982, judgment was entered making the Court of Appeals' decision the judgment and order of this court, and the petitioner was ordered retried within six months thereafter. Subsequently, by order of February 1, 1983, the time limit imposed for retrial was extended until 90 days after a final decision in all interlocutory appeals pursued by petitioner. This extension followed petitioner's reindictment and notification that the same aggravating circumstances relied on by the State at his first trial were to be relied on by the State at his retrial in addition to one new aggravating circumstance.[3]

Following that notification, petitioner filed a plea of former jeopardy in the courts of this State, contending that he could not be resentenced to death in violation of the Double Jeopardy Clause of the Fifth Amendment. Both the trial court and the Supreme Court of Georgia rejected his plea. *Young v. State*, 251 Ga. 153, 303 S.E.2d 431 (1983). The Supreme Court of the United States denied certiorari. *Young v. Georgia*, — U.S. —, 104 S.Ct. 740, 79 L.Ed.2d 198 (1984).

Pursuant to this court's order of February 1, 1983, petitioner's retrial was set for April 17, 1984. Petitioner is now before this court requesting that the district attorney be required to abide by this court's prior judgment

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3. Petitioner was notified that at his retrial, the State will rely on the additional aggravating circumstance that the murder was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim, O.C.G.A. § 17-10-30 (b) (7).

in again seeking the death penalty against him at retrial. More specifically, petitioner urges that the district attorney should not be allowed to again seek the death penalty against him on the basis of the statutory aggravating circumstances found by this court to be unsupported by the evidence because such reliance is precluded by the Double Jeopardy Clause.[4] The State's position, which is consistent with the ruling by the Supreme Court of Georgia, is that the judgment from which petitioner seeks relief can only refer to the judgment of the Court of Appeals which was made the judgment and order of this court on August 2, 1982; thus, no possible double jeopardy violation will result by the district attorney's again seeking the death penalty against petitioner even if based in part on the same aggravating circumstances previously noted by this court to be unsupported by sufficient evidence. This position is premised on the allegation that the Court of Appeals substituted its decision for the decision of this court and that as a result, because no mention was made of this court's findings regarding the sufficiency of the evidence to support the aggravating circumstances found by the jury, this court's findings in that regard were nullified.

Even though the parties have different opinions regarding the correct interpretation of the Court of Ap-

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4. In a footnote to his brief in support of his Motion to Enforce Judgment, petitioner urges that decisions by the United States Supreme Court, discussed later in this opinion, would seem to preclude the State from adding an aggravating circumstance as well, which in effect would preclude the State from again seeking the death penalty altogether.

peals' decision in this case, it would not be appropriate to wait until after petitioner has been retried and possibly resentenced to determine whether a double jeopardy violation will result if the district attorney is allowed to again seek the death penalty against petitioner based at least in part on the same aggravating circumstances relied on previously. *Cf. Abney v. United States*, 431 U.S. 651, 97 S.Ct. 2034, 52, L.Ed.2d 651 (1982) (" . . . [P]retrial orders rejecting claims of former jeopardy, such as that presently before us, constitute 'final decisions' and thus satisfy the jurisdictional prerequisites of § 1291." (footnote omitted). 52 L.Ed.2d at 662); *Patterson v. State*, 248 Ga. 875, 287 S.E.2d 7 (1982) (Denial of a timely filed plea of double jeopardy is appealable without resort to interlocutory appeal procedures). As stated in *Abney*,

> Finally, the rights conferred on a criminal accused by the Double Jeopardy Clause would be significantly undermined if appellate review of double jeopardy claims were postponed until after conviction and sentence. To be sure, the Double Jeopardy Clause protects an individual against being twice convicted for the same crime, and that aspect of the right can be fully vindicated on an appeal following final judgment, as the Government suggests. However, this Court has long recognized that the Double Jeopardy Clause protects an individual against more than being subjected to double punishments. It is a guarantee against being twice put to trial for the same offense.
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> * * *
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> Obviously, [this aspect] of the guarantee's protections would be lost if the accused were forced to 'run the gauntlet' a second time before an appeal could be taken; even if the accused is acquitted, or, if convicted, has his conviction ultimately reversed on

> double jeopardy grounds, he has still been forced to endure a trial that the Double Jeopardy Clause was designed to prohibit. Consequently, if a criminal defendant is to avoid exposure to double jeopardy and thereby enjoy the full protection of the Clause, his double jeopardy challenge to the indictment must be reviewable before that subsequent exposure occurs.

431 U.S. at 660, 662, 97 S.Ct. at 2040, 2041, 52 L.Ed.2d at 660, 661, and 662 (footnotes omitted). Thus, a discussion of the merits of petitioner's double jeopardy claim is appropriate even though petitioner has not yet been retried.

[1] At the outset, it should be noted that although this court's previous discussion regarding the sufficiency of the evidence to support the jury's findings regarding aggravating circumstances has been described by subsequent courts as a ruling, a close examination of that decision will reveal that the sufficiency of the evidence to support the death penalty was not discussed in detail as was the ineffective assistance of counsel issue and thus served merely as further justification for finding petitioner's death sentence invalid. Because emphasis was not placed by this court on its discussion regarding the sufficiency of the evidence, it is not surprising that the Court of Appeals did not discuss that issue. Consistent with the emphasis placed by this court, the Court of Appeals noted this court's findings regarding the sufficiency of the evidence in exemplifying petitioner's ineffective assistance of counsel. The discussion regarding the sufficiency of the evidence to support the aggravating circumstances found previously was simply an additional observation as to why petitioner's death sentence was invalid and was not necessarily intended to be a binding ruling in that regard. As a result, it cannot be said with certainty that a double

jeopardy violation will result if the district attorney is again allowed to seek the death penalty against petitioner.

Otherwise as to the merits of petitioner's double jeopardy claim, a collective reading of *Bullington v. State of Missouri*, 451 U.S. 430, 101 S.Ct. 1852, 68 L.Ed.2d 270 (1981); *Burks v. United States*, 437 U.S. 1, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978); and *Godfrey v. State*, 248 Ga. 616, 284 S.E.2d 422 (1981) supports petitioner's claim that his constitutional right against double jeopardy will be violated if the district attorney is again allowed to seek the death penalty against him. The sentencing phase of a trial is analogous to the guilt-innocence phase. *Bullington, supra.* If there is insufficient evidence to support a jury's verdict at the guilt-innocence phase of a trial, double jeopardy applies. As explained in *Burks;*

> . . . In short, reversal for trial error, as distinguished from evidentiary insufficiency, does not constitute a decision to the effect that the government has failed to prove its case. As such, it implies nothing with respect to the guilt or innocence of the defendant. Rather, it is a determination that a defendant has been convicted through a judicial process which is defective in some fundamental respect, *e.g.*, incorrect receipt or rejection of evidence, incorrect instructions, or prosecutorial misconduct. When this occurs, the accused has a strong interest in obtaining a fair readjudication of his guilt free from error just as society maintains a valid concern for insuring that the guilty are punished. *See* Note, Double Jeopardy: A New Trial After Appellate Reversal for Insufficient Evidence, 31 U Chi L Rev 365, 370 (1964).
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> The same cannot be said when a defendant's conviction has been overturned due to a failure of proof at trial, in which case the prosecution cannot complain of prejudice, for it has been given one fair oppor-

> tunity to offer whatever proof it could assemble.[10] Moreover, such an appellate reversal means that the government's case was so lacking that it should not have even been submitted to the jury. Since we necessarily afford absolute finality to a jury's *verdict* of acquittal—no matter now erroneous its decision—it is difficulty to conceive how society has any greater interest in retrying a defendant when, on review, it is decided as a matter of law that the jury could not properly have returned a verdict of guilty.
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> [10]In holding the evidence insufficient to sustain guilt, an appellate court determines that the prosecution has failed to prove guilt beyond a reasonable doubt. *See American Tobacco Co. v. United States,* 328 U.S. 781, 787 n. 4, 90 L.Ed. 1575, 66 S.Ct. 1125 [1128 n.4] (1946).

437 U.S. at 15 and 16, 98 S.Ct. at 2149 and 2150, 57 L.Ed.2d at 12 and 13.

The same rationale applies to the sentencing phase of a bifurcated trial. As stated in *Bullington,*

> . . . The 'embarrassment, expense and ordeal' and the 'anxiety and insecurity' faced by a defendant at the penalty phase of a Missouri capital murder trial surely are at least equivalent to that faced by any defendant at the guilt phase of a criminal trial. The 'unacceptably high risk that the [prosecution], with its superior resources, would wear down a defendant,' id., [*United States v. Difrancesco,* 449 U.S. 117] at 130, 66 L.Ed.2d 328, 101 S.Ct. 426 [at 433], thereby leading to an erroneously imposed death sentence, would exist if the State were to have a further opportunity to convince a jury to impose the ultimate punishment.

451 U.S. at 445, 101 S.Ct. at 1861, 68 L.Ed.2d at 283.[5]

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5. In *Godfrey v. State,* 248 Ga. 616, 284 S.E.2d 422 (1981), the Georgia Supreme Court noted that, "*Bullington* arose under a Missouri death penalty statute which is essentially identical to the Georgia statute." *Id.* at 617, 284 S.E.2d at 425.

[2] Based on the above, the Double Jeopardy Clause seemingly applies to a case such as this one; however, the facts are somewhat distinguishable here in that the implication to be drawn from the court's previous decision is not that there was insufficient evidence to support the death sentence but rather that the evidence was not sufficient to support the death penalty based on the particular aggravating circumstances relied on by the district attorney. In that sense, and for the reason that the district attorney is not seeking a greater or lesser sentence than that previously imposed, petitioner's constitutional right against double jeopardy will not be violated if the district attorney again seeks the death penalty based on the same evidence previously presented but in support of the proper aggravating circumstances.[6]

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6. If this court were to find, as has been suggested, that the evidence was sufficient to support the death penalty but that the aggravating circumstances presented to the jury were not properly relied on by the district attorney, this court's previous discussion regarding aggravating circumstances would be based on legal grounds and would be distinguishable from *Bullington* on that basis. *Cf. Godfrey*, 284 Ga. at 618, 284 S.E.2d at 425 ("The reversal in *Godfrey v. Georgia, supra* [446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398], was based on the premise that the Supreme Court of Georgia, in affirming a death sentence based on no more than a finding that the offense was outrageously or wantonly vile, horrible and inhuman, had allowed a standardless and unchanneled imposition of the death penalty 'in the uncontrolled discretion of a basically uninstructed jury.' *Godfrey v. Georgia, supra*, 446 U.S. at 429, 100 S.Ct. at 1765.") Also as was noted in *Godfrey* and is the case here, " . . . *Bullington* is distinguishable from the case at bar in that in *Bullington* there was a life sentence imposed at the first sentencing procedure whereas in the instant case a death penalty was imposed. Therefore, the danger of repeated attempts by the state to wear a defendant down and obtain the desired result is not

(Continued on next page)

[3] In an event, it would be futile to make a considered analysis here as to the effect of this court's prior judgment on petitioner's double jeopardy claim unless it was the Court of Appeals' intention to affirm—*in its entirety*—this court's previous decision regarding the sentencing phase of petitioner's trial. Although this court does not question its authority to interpret its own decision, it would not be appropriate to do so if indeed it was the Court of Appeals' intention to substitute its opinion for the opinion of this court, in which case the slate would be wiped clean and the district attorney could proceed with petitioner's retrial without further interference. On the other hand, if the Court of Appeals considered this court's previous discussion as to the sufficiency of the evidence to support the aggravating circumstances found by the jury as binding and affirmed this court in that regard, a more detailed consideration would have to be made of petitioner's claims made here and the effect of this court's prior judgment.

Based on this preliminary consideration and findings discussed herein, petitioner's Motion to Enforce Judgment is hereby DENIED. An appeal from this denial is likely to follow in light of the parties' previously stated desire that this matter be addressed by the Eleventh Circuit Court of Appeals. In that regard, while this court's order denying petitioner's motion is without a doubt an appeal-

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(Continued from previous page)

present. *Green v. State, supra* [246 Ga. 598, 272 S.E.2d 475]; *Spraggins v. State, supra* [243 Ga. 73, 252 S.E.2d 620]; *Davis v. State, supra* [242 Ga. 901, 252 S.E.2d 443]; *Redd v. State, supra* [242 Ga. 876, 252 S.E.2d 383]." *Id.*

able order, this court finds—out of an abundance of caution because of the unusual nature of the motion and appeal for which there is no clear precedent that the question which follows is a controlling question of law as to which there is a substantial ground for difference of opinion within the meaning of 28 U.S. C.A. § 1292(b) and that an immediate appeal from this order and answer to the question posed below will materially advance the ultimate termination of this litigation.

The controlling question is as follows:

Whether the United States Court of Appeals for the Eleventh Circuit through its decision in *Young v. Zant*, 677 F.2d 792 (11th Cir.1982) considered this court's finding that the statutory aggravating circumstances contained in O.C.G.A. §§ 17-10-30(b)(2) and (b)(4) were not authorized by the evidence as binding and reversed this court in that regard or substituted its opinion for the opinion of this court such that petitioner may be retried in a proceeding in which the State again seeks the death penalty based on the same two aggravating circumstances and/or on other additional statutory aggravating circumstances not utilized during petitioner's initial trial without violating his constitutional right against double jeopardy thereby.

Finally, this court will not consider petitioner's Motion to Enforce Judgment further until the Court of Appeals has had an opportunity to respond to the question set forth above. This court's order of February 1, 1983, remains in effect; thus, the time limit imposed for petitioner's retrial is extended until 90 days after a final decision is made and all appeals pursued regarding the claims discussed herein.

39669. YOUNG v. THE STATE.

WELTNER, Justice.

Young was convicted in the Superior Court of Greene County of murder, armed robbery and robbery by intimidation. He was sentenced to death for the murder, the jury having found two aggravating circumstances: that the offense of murder was committed while the offender was engaged in the commission of another capital felony, armed robbery (OCGA § 17-10-30(b)(2) (Code Ann. 27-2534.1)), and that the offender committed the offense of murder for the purpose of receiving money (OCGA § 17-10-30(b)(4) (Code Ann. § 27-2534.1)). In addition, Young received a life sentence for armed robbery and 20 years for robbery by intimidation. This Court affirmed in *Young v. State,* 237 Ga. 852 (230 SE2d 287) (1976). Young's subsequent petition for a writ of habeas corpus filed in state court was denied, and this Court affirmed. *Young v. Ricketts,* 242 Ga. 559 (250 SE2d 404) (1978), *cert. denied,* 442 U.S. 934 (99 SC 2870, 61 LE2d 304) (1979).

Young then initiated a habeas corpus proceeding in the United States District Court for the Middle District of Georgia. The district court set aside the death sentence, ruling that Young received ineffective assistance of counsel during the sentencing phase of his trial. Young v. Zant, 506 FSupp. 274 (M.D. Ga. 1980). As an additional ground for its holding, the court stated that ". . . the evidence was not legally sufficient to support the jury's finding beyond a reasonable doubt that the murder was committed *in the course of* an armed robbery or *for the purpose of* obtaining money." Id. at p. 280.

Thus, the court held that the evidence was not legally sufficient to support the jury's finding of the aggravating circumstances defined at OCGA § 17-10-30 (b) (2) and (b) (4) (Code Ann § 27-2534.1).

The United States Court of Appeals for the Eleventh Circuit reversed, holding that Young did not receive effective assistance of counsel at *either* stage of the bifurcated trial. Young v. Zant, 677 F2d 792 (11th Cir. 1982). Young's convictions were thus reversed, as well as his death sentence.

The court of appeals recognized that the district court had found, as an alternative ground for reversal of the death sentence, that the evidence was insufficient to support the finding of the two aggravating circumstances alleged by the State. "The district court concluded that the undisputed evidence showed that Young's victim, Reuben H. Flynt, was completely incapacitated before Young formed the intent to rob him. Thus, the court reasoned, the State had failed to prove that any of the essential elements of armed robbery, the taking of property from a person 'by use of an offensive weapon,' [OCGA § 16-8-41 (Code Ann. § 26-1902)], occurred prior to the assault; nor had it shown that Young's purpose in assaulting Flynt was to obtain money.

"Curiously, the district court did not discuss the legal effect of Flynt's incapacity, and therefore Young's taking *without* 'use of an offensive weapon,' on the validity of Young's conviction for armed robbery. This might have been due to petitioner's failure to make the claim that the State's evidence was insufficient under the standard set forth in *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979)." 677 F2d, supra, at p. 794, n. 3.

The court of appeals, having based its decision solely on ineffectiveness of counsel, did not expressly affirm the holding of the district court with respect to the sufficiency of the evidence. However, in discussing the issue of ineffectiveness at the guilt-innocence stage of the trial, the court made this observation: "Turning to the armed robbery count, we note the district court, in assessing the sufficiency of the State's evidence of aggravating circumstances on the malice murder charge, concluded that the State did not produce sufficient evidence to permit the jury to find beyond a reasonable doubt that Young had formed the intent to rob Flynt prior to the fatal assault. *Young v. Zant,* 506 F.Supp. at 280-81. This deficiency in the evidence should have been sufficiently clear to [defense counsel] to suggest a strong argument that Young did not rob Flynt by use of an offensive weapon and thus could not be guilty of armed robbery under [OCGA § 16-8-41 (Code Ann. § 26-1902)]." 677 F2d, supra, at p. 799.

The judgment of the court of appeals' opinion reads: "The district court's denial of the writ of habeas corpus with respect to the guilt phase of Charlie Young's trial is therefore REVERSED." 677 F2d, supra, at p. 800.

Young has been re-indicted in superior court for the same offenses — malice murder, armed robbery and robbery by intimidation. The State has once again announced its intention to seek the death penalty based upon the same aggravating circumstances, and with the possible addition of OCGA § 17-10-30 (b) (7) (Code Ann. § 27-2534.1). Young filed pleas of double jeopardy in opposition to the indictment for armed robbery and the attempt to seek the death penalty again. It is from the denial of these pleas in bar that Young now appeals.

1. We conclude that the holding of *Patterson v. State*, 248 Ga. 875 (287 SE2d 7) (1982), is applicable to this case. The denial of Young's double jeopardy pleas may be appealed without application and certification, which otherwise would be required under OCGA § 5-6-34 (b) (Code Ann. § 6-701).

2. Although the district court and court of appeals were in agreement as to the invalidity of Young's death sentence, we interpret the opinion of the court of appeals as a reversal of the district court. The court of appeals held that "[a]n examination of the record of the trial makes it plain that [defense counsel] did not accord Young even a modicum of professional assistance at any time." 677 F2d, supra, at pp. 794-5. Rather than reversing in part and affirming in part, the court of appeals chose to substitute its opinion for that of the district court.

We perceive that the effect of this reversal was to nullify the entire opinion of the district court and to place the parties in the position *quo ante*, subject, of course, to the holdings of the court of appeals. *Finney v. Tommey*, 50 Ga. 140 (1873); *Bigby v. Powell*, 15 Ga. 91 (1854); *Walker v. Dougherty*, 14 Ga. 653 (1854); *McKay v. McKay*, 93 Ga. App. 42 (3) (90 SE2d 627) (1955). See Gospel Army v. City of Los Angeles, 331 U.S. 543 (67 SC 1428, 91 LE 1662) (1947); Atlantic Coast Line R. Co. v. St. Joe Paper Co., 216 F2d 832 (5th Cir. 1954). It follows that in reviewing the denial of Young's double jeopardy pleas, we look only to the opinion of the court of appeals.

That court concluded that Young's convictions and sentences were invalid because Young did not receive reasonably effective legal assistance at either stage of his

trial. "Where a prisoner obtains his freedom by writ of habeas corpus, because he was denied the right of counsel when originally convicted, he does not obtain a release exonerating him from the charges for which he was tried, but the effect of such release is to set aside any plea, verdict, sentence, etc., that may have been entered in the case and he may then be arraigned as though no prior trial, etc., had taken place." *Patton v. State,* 111 Ga. App. 853 (143 SE2d 518) (1965), headnote; see *Fair v. Balkcom,* 216 Ga. 721, 728-9 (119 SE2d 691) (1961); see Bullington v. Missouri, 451 U.S. 430 (101 SC 1852, 68 LE2d 270) (1981).

3. As noted, the court of appeals recognized the holding of the district court that the evidence was insufficient to show that Young formed the intent to rob his victim prior to the fatal assault, and concluded that "[t]his deficiency in the evidence should have been sufficiently clear to [defense counsel] to suggest a strong argument that Young did not rob Flynt by use of an offensive weapon and thus could not be guilty of armed robbery under [OCGA § 16-41 (Code Ann. § 26-1902)]." 677 F2d, supra, at p. 799. Young contends that this constitutes a holding by the court of appeals that the evidence was insufficient to support aggravating circumstances (b) (2) and (b) (4) and the conviction of armed robbery. As is clear from our holding in Division 1, we do not agree. Nevertheless, were Young's contention correct, we observe that the court of appeals based its conclusions upon an inaccurate construction of state law, specifically, OCGA § 16-8-41 (Code Ann. § 26-1902), as Jackson v. Virginia, 443 U S 307 (99 SC 2781, 61 LE2d 560) (1979), which sets out the constitutional standard for review of the sufficiency of the evi-

dence, was not relied on by either the district court or the court of appeals.

"A person commits the offense of armed robbery when, with intent to commit theft, he takes property of another from the person or immediate presence of another by use of an offensive weapon. . . ." OCGA § 16-8-41 (a) (Code Ann. § 26-1902). In *Moore v. State*, 233 Ga. 861, 864 (213 SE2d 829) (1975), the appellant contended that " . . . there was no aggravating circumstance in [the] case because a person cannot be guilty of armed robbery if the victim is not conscious or alive at the time of the robbery." Rejecting that argument, we said: "In *Hicks v. State*, 232 Ga. 393 (207 SE2d 30), we concluded that [§ 16-8-41] 'clearly contemplates that the offensive weapon be used as a concomitant to a taking which involves the use of actual force or intimidation (constructive force) against another person.' p. 403

"This accords with the general rule in the United States that the force or intimidation essential to robbery must either precede or be contemporaneous with, and not subsequent to, the taking.

"Without the force used by appellant here, the taking from [the victim] could not have been accomplished. That [the victim] died from the force used either immediately, or subsequently to the taking, does not make the offense any less a robbery." Id.

Under the law of Georgia, therefore, the fact that Young's victim was incapacitated at the time of the taking cannot extricate his conduct from the definition of armed robbery in § 16-8-41 (a) (Code Ann. § 26-1902).

In *Moore,* supra, the defendant admitted that his purpose in going to the victim's house, where the fatal assault occurred, was to commit robbery. In the present case, the federal court appears to have concluded, based solely upon Young's statement, that Young did not intend to rob the victim at the time of the fatal assault. Absent a reliance upon Jackson v. Virginia, supra, in support of that determination, we conclude that the court's observations related to the *weight* of the evidence rather than constitutional sufficiency.

The evidence of intent to rob at the time of the shooting in this case clearly is sufficient under the very holding in Jackson v. Virginia. There, the United States Supreme Court stated: "From the circumstantial evidence in the record, it is clear that the trial judge could reasonably have found beyond a reasonable doubt that the petitioner did possess the necessary intent at or before the time of the killing." 443 U. S. supra at pp. 324-5. This determination was made in spite of Jackson's own statement to the contrary.

The ruling in Jackson is consistent with Georgia cases which hold that the element of malice may be implied from the circumstances surrounding the homicide. *Holt v. State,* 247 Ga. 648, 649 (278 SE2d 390) (1981) and cits. The jury is entitled to reject the defendant's statement in favor of such circumstantial evidence.

We therefore adhere to our former ruling that "[a] review of the evidence adduced by the state in this case shows that it is legally sufficient to support the finding by the jury of . . . aggravating circumstances [(b) (2) and (b) (4)]." *Young v. State,* supra, at p. 856.

It will be seen that such a standard for the assessment of evidence is a manifest necessity to the operation of any orderly and sensible system of criminal justice. Without it, courts would be bound inextricably to whatever version a defendant might offer. Thus, a bank robber apprehended in a circle of dead bodies would be entitled, as a matter of law, to acquittal upon his testimony that multiple homicide was reasonably necessary to protect himself from a combined felonious assault upon by by bank personnel. Or, every domestic killing would result in acquittal upon the surviving partner's testimony that the deceased launched attack with a butcher knife. Or, every burglar would be set free upon his statement that his entry into the dwelling of another at midnight was without intent to commit a felony or theft.

Judgment affirmed. All the Justices concur, except Hill, C. J., who concurs in part and dissents in part.

DECIDED MAY 25, 1983 —
REHEARING DENIED JULY 7, 1983.

Murder, etc. Greene Superior Court. Before Judge Duke.

Donald W. Huskins, James A. Nolan, for appellant.

Joseph H. Briley, District Attorney, Norman R. Miller, Assistant District Attorney, Michael J. Bowers, Attorney General, for appellee.

HILL, Chief Justice, concurring in part and dissenting in part.

At Young's trial, the state introduced evidence from which the jury was authorized to find the following facts:

Mr. Reuben Flynt, vice president of the Farmer's Bank in Union Point, Georgia, was shot and killed in his home on December 15, 1973. At approximately 11:30 a.m. December 15, Young and his nephew drove from Atlanta to Union Point (a distance of about 75 miles). Young was carrying a .22 caliber pistol. Arriving in Union Point, Young and his nephew drove to the Farmer's Bank looking for Mr. Flynt's car, then to Mr. Flynt's home, returned to the bank, and then returned to Mr. Flynt's home where they saw Flynt's car.

Young entered Flynt's home, shot him four times at close range, removed Flynt's billfold from his rear pocket, and hit the victim several times with the pistol.

Young and his nephew then returned to the bank where Young sent the nephew inside with the victim's wallet. The nephew said: "The man that gave me this billfold said for you to give me $60,000 or he will kill Reuben Flynt in 15 minutes." The nephew was given about $10,000, and police arrested him as he was leaving the bank. Young fled.

When Young was arrested, the .22 pistol was found in the car. Ballistics evidence showed that pistol to be the murder weapon. The victim died from loss of blood.

The jury was authorized not to believe the following self-serving statements made by Young. That Young went to the victim's home to discuss overdue bank loans; that Young did not carry the pistol with him when he first went to the victim's door; that Young and the victim argued over the unpaid loans; and that the idea to get money from the bank did not occur to Young until after the victim had been shot.

The jury found Young guilty of murder, armed robbery and robbery by intimidation, and it imposed the death penalty for the murder based on two statutory aggravating circumstances, that the murder was committed while the offender was engaged in the commission of an armed robbery, OCGA § 17-10-30(b) (2) (formerly Ga. Code Ann. § 27-2534.1(b) (2)), and that the offender committed the murder for the purpose of receiving money, OCGA § 17-10-30(b) (4) (formerly Ga. Code Ann. § 27-2534.1(b) (4)).

After his convictions and death sentence were affirmed by this court, *Young v. State,* 237 Ga. 852 (230 SE2d 287) (1976), and the denial of his petition for habeas corpus was affirmed, *Young v. Ricketts,* 242 Ga. 559 (250 SE 2d 404) (1978), cert. denied sub nom. Young v. Zant, 442 U.S. 934 (1979), Young sought habeas corpus relief in the federal district court urging, among other grounds, that his trial counsel rendered ineffective assistance and that the evidence did not support the statutory aggravating circumstances. The district court found the evidence insufficient to support those aggravating circumstances and vacated the death penalty for that reason as well as for ineffective assistance of counsel during the sentencing phase of trial. Young v. Zant, 506 FSupp. 274, 280-281 (M.D. Ga. 1980).

Young and the state appealed. The circuit court in its opinion dealt with the question of ineffective assistance of counsel. The circuit court noted the district court's finding that the evidence as to armed robbery was insufficient to support the first aggravating circumstance and said: "This deficiency in the evidence should have been sufficiently clear to [defense counsel] to suggest a strong argument that Young did not rob Flynt by use of an of-

fensive weapon and thus could not be guilty of armed robbery. . . ." Young v. Zant, 677 F2d 792, 799 (11th Cir. 1982). The circuit court granted habeas relief as to the guilt phase of Young's trial based on ineffective assistance of counsel.

Based on the foregoing, Young contends first that double jeopardy prevents his being retried for armed robbery and robbery by intimidation, and he argues next that double jeopardy prevents the state from seeking the death penalty on the two statutory aggravating circumstances referred to above. Young argues that the evidence as to the crimes of armed robbery and robbery by intimidation has been found to be insufficient and hence that retrial on those charges is barred, as is the imposition of the death penalty based on the corresponding aggravating circumstances. I will deal first with the crimes themselves and then with the aggravating circumstances. Regarding the crime of robbery by intimidation, the evidence is undisputed that Young and his accomplice drove from the murder victim's home to the bank, that the accomplice presented the victim's wallet to a teller and said "The man that gave me this billfold said for you to give me $60,000 or he will kill [the victim] in fifteen minutes," that the accomplice received about $10,000, and that the idea for this crime was Young's.

OCGA § 16-8-40 (formerly Ga. Code Ann. § 26-1901) provides: "(a) A person commits the offense of robbery when, with intent to commit theft, he takes property of another from the person or the immediate presence of another: . . . (2) By intimidation, by the use of threat or coercion, or by placing such person in fear of immediate serious bodily injury to himself or to another. . . ." The

evidence in this case is sufficient to prove robbery by intimidation and neither the district court nor the circuit court of appeals has found to the contrary. The district court found only that Young did not contemplate taking money from the bank until after the shots had been fired and the blows struck, Young v. Zant, supra, 506 FSupp. at 280, and thus that the evidence as to the second aggravating circumstance—murder for the purpose of receiving money—was insufficient. The court below did not err in overruling Young's plea of double jeopardy as to the crime of robbery by intimidation.

Regarding the crime of armed robbery, the evidence shows that Young drove from Atlanta to Union Point, Georgia, taking a .22 caliber pistol with him, that Young shot the victim four times at close range, and that Young then took the victim's billfold from his rear pocket and then hit the victim, who was still alive, with the pistol.

OCGA § 16-8-41 (a) (formerly Ga. Code Ann. § 26-1902) provides: "A person commits the offense of armed robbery when, with intent to commit theft, he takes property of another from the person or the immediate presence of another by use of an offensive weapon. . . ." The jury was authorized to find Young guilty of armed robbery regardless of when the intent to take the victim's billfold arose, regardless of whether the victim was incapacitated and even if the victim had been killed instantly. See *Moore v. State,* 233 Ga. 861 (2b) (213 SE2d 829) (1975), cert denied, 428 U.S. 910 (1976). A person is guilty of armed robbery under OCGA § 16-8-41 (a) (Code Ann. § 26-1902), supra, when the victim is shot before the taking as well as when the victim is shot after the taking, or it not shot at all. See *Moore v. State,* supra.

In my view, the evidence is sufficient to prove armed robbery in this case and either the district court nor the circuit court of appeals has found to the contrary. That issue was not before either court. See Young v. Zant, supra, 677 F2d at 799, n. 12. The district court found that the jury could only speculate that Young intended to rob the victim before committing the murder, Young v. Zant, supra, 506 FSupp. at 280-281, and thus that the evidence as to the first aggravating circumstance—murder committed in *the course* of an armed robbery—was insufficient (emphasis in the district court opinion, Young v. Zant, supra, 506 FSupp. at 280).

As for the armed robbery, the circuit court merely observed that Young's attorney could have made an "argument that Young did not rob [the victim] by use of an offensive weapon and thus could not be guilty of armed robbery. . . ." Young v. Zant, supra, 677 F2d at 799. That a lawyer was ineffective because he could have made an argument is not a finding that the evidence was insufficient. The court below did not err in overruling Young's plea of double jeopardy as to the crime of armed robbery.

Regarding the sufficiency of the evidence as to murder committed in the commission of an armed robbery and as to murder committed for the purpose of receiving money, the district court, whether right of [sic] wrong, found the evidence as to both these aggravating circumstances to be insufficient. Young v. Zant, supra, 506 FSupp. at 280-281.

The state appealed, Young v. Zant, supra, 677 F2d at 794, and the circuit court did not reverse the district court's finding and conclusions as to the sufficiency of the evidence as to either aggravating circumstance.

Under Bullington v. Missouri, 451 U.S. 430, 442-446 (101 SC 1852, 68 LE2d 270) (1981), and Burks v. United States, 437 US 1 (98 SC 2141, 57 LE2d 1) (1978), double jeopardy prevents Young from being retried and sentenced to death for either of these aggravating circumstances regardless of our view of the sufficiency of the evidence to support those aggravating circumstances and notwithstanding the trial jury's findings that Young murdered Mr. Flynt while engaged in the commission of an armed robbery and that Young murdered Flynt for the purpose of receiving money. Jackson v. Virginia, 443 U.S. 307 (99 SC 2781, 61 LE2d 560) (1979).

I therefore concur in the majority opinion insofar as it affirms the overruling of Young's plea of double jeopardy as to the crimes of armed robbery and robbery by intimidation, but I am bound to dissent insofar as the majority affirms the overruling of Young's plea of double jeopardy as to the two aggravating circumstances. Thus, I am forced to conclude that Young cannot be resentenced to death. *Godfrey v. State,* 248 Ga. 616, 625 (dissenting opinion by Hill, P.J.) (284 SE2d 422) (1981), cert. denied 456 U.S. 919 (1982).

APPENDIX "E"

Charlie YOUNG, Jr., Petitioner-Appellee,
Cross-Appellant,

v.

Walter ZANT, Warden, Georgia Diagnostic & Classification Center, Respondent-Appellant, Cross-Appellee.

No. 81-7123.

United States Court of Appeals,
Eleventh Circuit.
May 14, 1982.

Georgia prisoner sought federal habeas corpus. The United States District Court for the Middle District of Georgia, at Athens, Wilbur D. Owens, Jr., Chief Judge, 506 F.Supp. 274, found that defendant had been denied effective assistance of counsel during presentencing phase of bifurcated trial and set aside death sentence, but found no constitutional infirmity as to the convictions, and both the defendant and the state appealed. The Court of Appeals, Tjoflat, Circuit Judge, held that defendant was deprived of constitutional right to effective assistance of counsel in defending all of the charges against him.

Reversed.

If counsel's conduct at trial, viewed in the context of the totality of the circumstances, falls below the range of competency generally demanded of attorneys in criminal cases, criminal conviction obtained through such a trial unconstitutionally deprives defendant of liberty, and competence of appointed and retained counsel is judged by the same standard. U.S.C.A.Const.Amend. 6.

Whether defense counsel has rendered adequate assistance is a mixed question of fact and law that requires the application of legal principles to the historical facts of the case.

Absent clearly erroneous determination by district court in habeas corpus proceeding on issue of effective assistance of counsel, Court of Appeals defers to district court's findings on such primary facts as what the attorney did or did not do during the course of trial, but will apply its own judgment to the question of whether that conduct constituted the ineffective assistance.

Defendant was deprived of effective assistance of counsel in state court trial for malice murder, armed robbery, and robbery by intimidation, where counsel adopted unsupportable defense to all counts and ignored obvious defenses to malice murder and armed robbery charges, conceded guilt of all three crimes, and did so because of mistaken belief that such action was strategically necessary in order to make a strong plea for mercy, as he was unaware of Georgia's bifurcated proceeding in death penalty cases. U.S.C.A.Const.Amend. 6.

Susan V. Boleyn, Asst. Atty. Gen., Atlanta, Ga., for respondent-appellant, cross-appellee.

Laughlin McDonald, Atlanta, Ga., Randolph Z. Volkell, Hollis, N.Y., for petitioner-appellee, cross-appellant.

Before TJOFLAT, HILL and ANDERSON, Circuit Judges.

TJOFLAT, Circuit Judge:

On February 19, 1976, the petitioner, Charlie Young, Jr., was convicted of malice murder, armed robbery and robbery by intimidation by a jury in the Superior Court of Greene County, Georgia. The jury, following a presentencing hearing, recommended that Young be sentenced to death on the malice murder charge, and the court sentenced Young accordingly. The court also sentenced Young to life imprisonment on the armed robbery charge and to twenty years for robbery by intimidation.

[1] After exhausting his state remedies,[1] Young commenced this habeas corpus proceeding in the district court, contending that his convictions were invalid because he was denied his sixth and fourteenth amendment right to effective assistance of counsel. The district court found that Young had been denied effective assistance of coun-

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1. The Supreme Court of Georgia affirmed Young's convictions and the death sentence. *Young v. Georgia,* 237 Ga. 852, 230 S.E.2d 287 (1976). Young then filed a petition for a writ of habeas corpus in the Superior Court of Butts County, Georgia. After conducting an evidentiary hearing the court denied the petition. The Supreme Court of Georgia, affirmed, and the Supreme Court of the United States denied certiorari. *Young v. Ricketts,* 242 Ga. 559, 250 S.E.2d 404 (1978), *cert. denied,* 442 U.S. 934, 99 S.Ct. 2870, 61 L.Ed.2d 304 (1979).

sel during the presentencing phase of his bifurcated trial and set aside the death sentence.[2] *Young v. Zant*, 506 F. Supp. 274 (M.D.Ga.1980). The court also determined that the evidence the jury was permitted to consider in deliberating the death penalty was insufficient to prove that the homicide was committed under either of the two aggravating circumstances alleged by the State, namely, that Young committed the murder during the course of an armed robbery or for the purpose of obtaining money,[3] and cited this failure of proof as an alternative ground for

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2. The district court based its conclusion on the evidence adduced at the hearing conducted by the state trial court on Young's habeas petition. Since effective assistance of counsel is a mixed question of law and fact, the district court was not bound by the state court's determination that Young had received adequate representation. *See Cuyler v. Sullivan*, 446 U.S. 335, 341-42, 100 S.Ct. 1708, 1714-15, 64 L.Ed.2d 333 (1981); *Baty v. Balkcom*, 661 F.2d 391, 394 n.7 (5th Cir. 1981).

3. The district court concluded that the undisputed evidence showed that Young's victim, Reuben H. Flynt, was completely incapacitated before Young formed the intent to rob him. Thus, the court reasoned, the State had failed to prove that any of the essential elements of armed robbery, the taking of property from a person "by use of an offensive weapon," Ga. Code Ann. § 26-1902, occurred prior to the assault; nor had it shown that Young's purpose in assaulting Flynt was to obtain money.

   Curiously, the district court did not discuss the legal effect of Flynt's incapacity, and therefore Young's taking *without* "use of an offensive weapon," on the validity of Young's conviction for armed robbery. This might have been due to petitioner's failure to make the claim that the State's evidence was insufficient under the standard set forth in *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).

setting aside the death sentence.[4] As to the guilt phase of Young's trial, the court found no constitutional infirmity and therefore upheld each of Young's convictions. *Id.*

Both Young and the State of Georgia appeal. Young contends that his trial attorney, Reuben A. Garland, was unaware of the existence or purpose of the bifurcated trial procedure in Georgia death penalty cases whereby the issues of guilt and punishment are considered by the jury in separate proceedings;[5] Garland believed that the jury would, in accordance with the former Georgia procedure, consider guilt and punishment together. According to Young this complete lack of understanding of how his case was to be tried caused Garland to adopt a trial strategy of conceding Young's guilt and pleading for mercy during the guilt phase of the proceeding. Had Garland known that the jury would not be considering whether to recommend mercy as it deliberated the issue of guilt, Young contends, Garland would not have conceded that issue to the State. Instead, he would have argued that Young was guilty not of malice murder but of some lesser included offense, such as voluntary manslaughter, and thus would have removed altogether the

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4. At least one aggravating circumstance must be established beyond a reasonable doubt to authorize the imposition of the death penalty under Georgia law, Ga.Code Ann. § 27-2534.1(c).

5. Pursuant to Ga.Code Ann. § 27-2503(b), the jury first considers only the question of guilt or innocence. If it returns a guilty verdict and the State seeks the death penalty, the trial is resumed. The jury then considers evidence of aggravating and mitigating circumstances and the arguments of counsel. If the jury finds at least one aggravating circumstance beyonds a reasonable doubt, it must decide whether to recommend the death sentence. *See* Ga.Code Ann. § 27-2534.1(c).

threat of the death penalty from the case. Garland also would have argued that the evidence did not support the charges of armed robbery or robbery by intimidation.

The State concedes, as it must on this record, that Garland was unaware of Georgia's bifurcated proceeding in death-penalty cases but contends that he nevertheless provided Young with adequate representation at both the guilt and presentencing phases of the trial. The State also submits that the evidence proved the two aggravating circumstances alleged in Young's indictment and that the sentence of death was therefore lawfully imposed. The State asks that we reverse the district court and deny the writ.

An examination of the record of the trial makes it plain that Garland did not accord Young even a modicum of professional assistance at any time. The petitioner's convictions are consequently invalid, and we direct the district court to issue the writ of habeas corpus.

I.

A.

The State's murder and armed robbery cases against Charlie Young were built on a confession he gave to FBI agents following his arrest and on the testimony of expert witnesses who corroborated his confession with the results of the ballistics, fingerprint and blood tests they conducted. There were no eyewitnesses other than Charlie Young. The State's case of robbery by intimidation, on the other hand, was established principally by persons who saw the offense committed.

According to the confession, on December 15, 1975, Charlie Young, accompanied by his nephew Derwin Young, drove from Atlanta to Union Point, Georgia, hoping to meet with Reuben H. Flynt, vice president of Farmers Bank in Union Point. Flynt had made two bank loans to Charlie Young, and Young had fallen behind in his payments. He feared that the bank would ask his grandmother, who had co-signed his notes, to assume his obligations. He wanted Flynt to set up a new payment plan that would not involve his grandmother.

Charlie and Derwin Young arrived in Union Point during the lunch hour. They drove immediately to Farmers Bank. When Charlie Young noticed that Flynt's automobile was not there, they drove on to Flynt's house, back to the bank and finally back to Flynt's house before Young spotted Flynt's car. They parked in Flynt's driveway, and Charlie Young went to the front door of Flynt's house and rang the bell. Flynt met Young at the door and told him to return to the bank, where Flynt would meet him in thirty minutes. Young was dissatisfied with this arrangement, so he went to his car, got his wife's .22 caliber pistol, returned to the house, walked in and began discussing the two loans with Flynt. During the course of the discussion, Young telephoned his grandmother's house but was unable to reach her. The conversation resumed and led to a heated argument. The two men struggled. Young hit Flynt several times with the butt of the gun and shot him four times at closer range. As Flynt lay dying, Young ripped the telephone from the wall and removed Flynt's billfold from his rear pocket.

At this point, Young thought of a way of getting money from Farmers Bank. He returned to his car, and he and Derwin Young drove to the bank. Following Char-

lie's instructions, Derwin entered the bank, handed Flynt's wallet to a teller and said, "The man that gave me this billfold said for you to give me $60,000 or he will kill Reuben Flynt in fifteen minutes." The teller immediately notified the president of the bank, John Stewart, who called the police and the FBI and then instructed the teller to give Derwin Young $10,000. As Derwin left the bank with the money he was arrested by police officers responding to Stewart's call.

When Derwin Young did not return to the car, Charlie Young fled to his grandmother's house. The police followed him there, arrested him and took him to the Greene County Courthouse. At the courthouse, Charlie Young was questioned and gave the confession that made the State's case. He also consented to a search of his automobile.[6] The search yielded the .22 caliber pistol Young used to kill Reuben Flynt and Flynt's checkbook covered with blood.

In January 1976, a Greene County grand jury indicted Charlie Young, charging him with the malice murder, Ga.Code. Ann. § 26-1101(a), and armed robbery of Reuben H. Flynt, Ga.Code Ann. § 26-1902, and the robbery of John Stewart, the Farmers Bank president, by intimidation, Ga.Code. Ann. § 26-1901. The prosecutor gave timely notice that if Young were convicted of malice murder, the State would establish two aggravating circumstances in the presentencing hearing: that the defendant committed the murder during the commission of another capital felony, armed robbery, Ga. Code Ann. § 27-2534.1(b) (2), and that he committed it for the purpose of obtaining money, Ga.Code Ann. § 27-2534.1(b) (4). The prosecutor would

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6. Neither the admissibility of Young's statement nor the propriety of the search is challenged in this appeal.

ask the jury to recommend the death penalty if it found either of these aggravating circumstances beyond a reasonable doubt. At his arraignment Young entered a plea of not guilty.

Charlie Young's family retained Reuben A. Garland to represent him at trial. Garland, a member of the Georgia bar since 1920, was assisted by Frank Petrella, a young associate of an Atlanta law firm. The firm loaned Petrella to Garland strictly for Young's trial; Petrella was not retained by Young's family. Garland relegated Petrella to a minor role in the case, making it plain at the outset that Petrella was to speak only when Garland addressed him.

B.

The State's burden was clear from the start. To obtain a conviction for malice murder the prosecution was required to prove that the accused deliberately intended to kill Reuben H. Flynt under circumstances devoid of considerable provocation or showing an abandoned and malignant heart. Ga.Code Ann. § 26-1101(a). To obtain a conviction for armed robbery the prosecution was required to prove that with intent to commit theft of a person, the accused took Flynt's billfold by using an offensive weapon. Ga.Code Ann. § 26-1902(a). To establish robbery by intimidation the prosecution was required to prove that, under the accused's direction, Derwin Young took money from John Stewart by placing him in fear of Flynt's safety. Ga.Code Ann. § 26-1901.

Garland had two options in preparing Young's defense; he could put the State to the proof or he could seek to avoid the State's case with an affirmative defense. Gar-

land opted for the latter strategy; he would establish that his client was not guilty by reason of insanity.[7] Garland could not support this defense, however, Charlie Young's confession gave no indication that Young was insane when he assaulted Flynt, and Garland did not uncover any evidence that pointed to insanity. Indeed Garland did not even have his client examined by a psychiatrist to determine his mental capacity at the time of the alleged offenses. Garland did enter a special plea of insanity prior to trial, but he entered it under the erroneous belief that the plea raised the question of whether Young was insane when the offenses were committed.[8] A special plea of insanity, under Georgia law, actually questions the defendant's competence to stand trial, Ga.Code Ann. § 27-1502; it has nothing whatever to do with the affirmative defense of insanity, which is raised by a general plea of insanity. A court ordered psychiatric examination demonstrated that the defendant was competent to stand trial, and Garland withdrew his special plea of insanity.[9] Garland thus proceeded to trial on an insanity defense he could not possibly establish.

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7. Frank Petrella testified in the state habeas corpus proceedings that, from the beginning, Garland considered insanity the only plausible defense.

8. When he testified in the state habeas corpus proceeding, Garland did not know the difference between a general and a special plea of insanity under Georgia law.

9. The psychiatrist found that Young understood the charges lodged against him and was competent to assist counsel in his defense.

The trial began on February 17, 1976. Jury selection took approximately one and one-half days, and the State began its case on the afternoon of the 18th with the prosecutor calling twelve witnesses. Garland failed to cross-examine four of these witnesses and his questioning of all but one of the other eight was cursory and superficial. At the end of the afternoon, the court announced that it would run a night session and adjourned for dinner. Garland subsequently met the trial judge on the courthouse steps and told him that he would not be present when the trial resumed that evening. He did not ask the court to cancel the night session; nor did he tell his client that he would be absent.

Petrella filled in for Garland that evening, and though he was not prepared to cross-examine the six witnesses the State called to the stand, all experts from the Georgia Crime Lab, he did so. Garland reappeared the next morning, and the State put on its last five witnesses. He briefly cross-examined three of them. The State then rested, having established the facts we have related. The defense had no evidence to present, so it also rested. Garland made no motion for a directed verdict of acquittal. The court then held a brief charge conference. Garland requested two instructions, a charge on insanity and a charge regarding the right of the defendant to remain silent. Despite the absence of evidence in the record to support a finding of insanity, the court included both requested charges in its final instructions to the jury. No mention of the death penalty was made either during the charge conference or in the court's proposed instructions. Under Georgia's bifurcated procedure in death-penalty cases, of course, whether the death penalty or mercy

should be recommended by the jury was not germane to the determination of guilt or innocence.

Inexplicably, Garland somehow convinced himself that the jury would be instructed to make a recommendation on the death penalty as it deliberated the question of guilt on the malice murder charge. Because it was beyond dispute that his client had killed Reuben Flynt and might be found guilty of malice murder, Garland focused his entire argument to the jury on the punishment it should mete out. He abandoned any notion that the jury might be persuaded to find his client guilty of the lesser crime of manslaughter on the theory that Flynt's homicide was committed during a heated argument. He also abandoned, for lack of proof, his defense that his client was insane at the time of the offense. As his argument unfolded, Garland conceded that his client was guilty of malice murder and begged for mercy. He assured the jury that Young would never be returned to society with these words: "Under the evidence of this case, I only ask you for life . . . under the evidence of this case he will never get a pardon."[10] Although the trial judge admonished Garland to save his argument on punishment for the sentencing phase of the trial, if one became necessary, Garland failed to heed this admonition and continued to plead for mercy.

With both the prosecution and the defense advising it that Charlie Young had committed malice murder, the jury promptly found Young guilty of that offense and

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10. Only a portion of Garland's closing argument has been transcribed. However, we think it is clear that the quoted remark was an admission by Garland in the guilt phase of trial that his client was guilty. *See Young v. Zant*, 506 F.Supp. at 279.

armed robbery and robbery by intimidation as well. The court then declared a brief recess so the parties could prepare for the presentencing hearing on the death penalty issue. By this time it was clear to the trial judge that although Garland had more than a half century of experience in the trial of criminal cases, Garland did not comprehend the purpose of the presentencing hearing; so the judge instructed Petrella to explain the procedure to Garland. Petrella advised Garland that this was the time for the defense to introduce mitigating evidence that might lead the jury to recommend no death sentence and he advised Garland that Young could be put on the stand to explain his actions even though he had not testified in the earlier proceeding. As the district court noted, Charlie Young was college-educated and articulate, he had never been in trouble with the law, and he had received a favorable employment recommendation from the Sheriff of Greene County. This favorable background might have prompted the jury to recommend mercy, but Garland did not call Young to the stand or introduce any evidence.

We do not have the transcript of the lawyers' final summations to the jury. We assume that Garland attempted to rebut the State's claim that the malice murder had been committed in the course of another capital felony or for the purpose of obtaining money. We also assume that Garland concluded, as he did when he addressed the jury in the guilt phase of the trial, with a naked plea for mercy. We do know that the jury rejected his plea, for it recommended that Young be sentenced to death.

II.

[2, 3] A criminal defendant has a constitutional right to competent counsel; and we judge the competence of

appointed and retained counsel by the same standard. *Cuyler v. Sullivan,* 446 U.S. 335, 344-45, 100 S.Ct. 1708, 1716, 64 L.Ed.2d 333 (1980). A criminal defendant is not entitled to error-free counsel. *Mylar v. Alabama,* 671 F.2d 1299, 1300 (11th Cir. 1982). Nor can he complain of representation that might be judged ineffective only by the benefit of hindsight. *Clark v. Blackburn,* 619 F.2d 431, 433 (5th Cir. 1980).[11] However, if counsel's conduct at trial, viewed in the context of the totality of circumstances, falls below the range of competency generally demanded of attorneys in criminal cases, a criminal conviction obtained through such a trial unconstitutionally deprives the defendant of his liberty. *See Cuyler v. Sullivan,* 446 U.S. at 344, 100 S.Ct. at 1715-1716; *McMann v. Richardson,* 397 U.S. 759, 771, 90 S.Ct. 1441, 1449, 25 L.Ed.2d 763 (1970); *Mylar v. Alabama,* 671 F.2d at 1301; *Baty v. Balkcom,* 661 F.2d 391, 394 (5th Cir. 1981).

[4, 5] Whether defense counsel has rendered adequate assistance is a mixed question of fact and law that requires the application of legal principles to the historical facts of the case. *Cuyler v. Sullivan,* 446 U.S. at 341-42, 100 S.Ct. at 1715; *see Baty v. Balkcom,* 661 F.2d at 394 n.7. Absent a clearly erroneous determination, we defer to the district court's findings on such primary facts as what the attorney did or did not do during the course of the trial. However, we will apply our own judgment to the question of whether that conduct constituted ineffective assistance.

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11. We are bound by decisions of the Fifth Circuit Court of Appeals rendered before the close of business on September 30, 1981. *Bonner v. City of Prichard,* 661 F.2d 1206 (11th Cir. 1981).

[6] Where defense counsel is so ill prepared that he fails to understand his client's factual claims or the legal significance of those claims or that he fails to understand the basic procedural requirements applicable in court, we have held that counsel fails to provide service within the range of competency expected of members of the criminal defense bar. *See Baty v. Balkcom,* 661 F.2d at 394-95; *Kemp v. Leggett,* 635 F.2d 453 (5th Cir. 1981); *Gaines v. Hopper,* 575 F.2d 1147 (5th Cir. 1978). Although the degree of preparation adequate to defend a particular client is not always easy to discern, we find no difficulty on the facts of this case. We wholeheartedly agree with Young's contention that a competent defense lawyer would have handled this case far differently than Garland did.

First, competent counsel would not have gone to trial on an insanity defense without evidence to support it. *Cf. Gaines v. Hopper,* 575 F.2d at 1149 (counsel was not competent where, as the result of his failure to prepare, he was in no better position than his jailed client to evaluate the legal realities of the case or make informed evaluation of potential defenses). The insanity defense in this case amounted to no defense at all, a fact Garland apparently did not recognize until counsel began their final summations to the jury.

Second, competent counsel would have been sufficiently familiar with his client's case to recognize the weak points in the State's cases on both the malice murder and armed robbery charges. *See, e.g., Baty v. Balkcom,* 661 F.2d at 394-95. Competent counsel would have determined that the evidence that Young took Reuben Flynt's life with

malice aforethought was extremely thin. To be sure the State had Young's confession, but that confession contained scant evidence of a predisposition to commit murder; and it provided the defense with strong evidence that the homicide was committed in the heat of passion and was not malice murder but manslaughter. Competent counsel would also have realized that there was little doubt that Young drove to Union Point to see Flynt about two bank loans, not to kill him, and that the seeds of the crimes in this case were not planted until, at Flynt's house, Flynt asked Young to return to the bank. Counsel would have argued that this rejection obviously did not set well with Young because he wanted to dispose of his financial problem then and there, and that Young thought his wife's .22 caliber pistol would be of assistance, so he went to his car to get it. In short, competent counsel would have immediately recognized that there was nothing in Young's confession that indicated that Young intended to use the gun for any purpose other than to force Flynt to discuss the loans. If anything, the confession shows that Young became quite confused as to what to do after he returned to Flynt's house and even attempted to telephone his grandmother for advice. The pistol apparently came into play only when the argument broke out and the struggle ensued. Young used it to subdue Flynt, and he killed Flynt in the process.

It is not within the district court's or our province to say whether on this record Young was guilty of malice murder or some lesser included offense. But it is our duty to determine whether Young received legal representation that passed constitutional muster. In this case, given the evidence the State produced, we have no diffi-

culty at all in concluding that Young's counsel neglected a very strong argument that Young killed Flynt in the heat of passion and thus was guilty, if at all, of voluntary manslaughter. *See* Ga.Code Ann. § 26-1102. At the very least, counsel should have requested a jury instruction on that lesser included offense, since in the absence of such a request the court is not required to give the instruction. *See Jackson v. Georgia,* 239 Ga. 40, 235 S.E.2d 477 (1977).

Turning to the armed robbery count, we note the district court, in assessing the sufficiency of the State's evidence of aggravating circumstances on the malice murder charge, concluded that the State did not produce sufficient evidence to permit the jury to find beyond a reasonable doubt that Young had formed the intent to rob Flynt prior to the fatal assault. *Young v. Zant,* 506 F.Supp. at 280-81. This deficiency in the evidence should have been sufficiently clear to Garland to suggest a strong argument that Young did not rob Flynt by use of an offensive weapon and thus could not be guilty of armed robbery under Ga. Code Ann. § 26-1902.[12]

Garland's failure to adopt the obvious defenses to the State's murder and armed robbery charges and his failure to request a charge on voluntary manslaughter indicates such lack of preparation and exercise of skill that we do not hesitate to conclude that his conduct fell far short of that required of counsel in a criminal trial. *See Kemp v. Leggett,* 635 F.2d at 454. However, Garland's incompe-

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12. Although the petitioner did not raise a claim regarding the sufficiency of the evidence to support his armed robbery conviction, we consider the insufficiency of that evidence in assessing the adequacy of Garland's assistance to Young under the sixth amendment.

tent conduct went even further, for he not only adopted an unsupportable defense to all counts and ignored the obvious defenses to the malice murder and armed robbery charges, he conceded his client's guilt of all three crimes for which he was charged in the guilt phase of the trial; and he did so because of his mistaken belief that such an action was strategically necessary in order to make a strong plea for mercy. Whether, on the facts of this case, such a tactical decision would have been proper under the former Georgia criminal procedure, which Garland still believed to be in effect, we can discern *no* possible reason for this conduct under the present bifurcated procedure. Garland simply failed to inform himself of basic Georgia criminal procedure, a failure that, in this instance, deprived Young of his constitutional right to effective assistance of counsel in defending all of the charges against him.

The district court's denial of the writ of habeas corpus with respect to the guilt phase of Charlie Young's trial is therefore REVERSED. On receipt of the mandate, the district court shall grant the writ.